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No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX
VOLUME II OF II

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* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 04-5564 (NG) (VVP)

ORAN ALMOG, et. al.

Plaintiffs,

v.

ARAB BANK, PLC,

Defendants.

CV 05-388 (NG) (VVP)

GILA AFRIAT-KURTZER, et. al.

Plaintiffs,

v.

ARAB BANK, PLC,

Defendants.

DECLARATION OF STEFAN TALMON

I, Stefan Talmon, declare as follows:

1. I have been asked by counsel for the defendant in the above-titled civil actions to provide my opinion on several specialized questions of public international law. This opinion is to assist the Court in considering the defendant's reply to the plaintiffs' Memorandum in Opposition to the Defendant's Motion to Dismiss the First Amended Complaints.

2. I have read both the First Amended Complaints, dated January 25, 2005 ("the Complaints") and the Memorandum in Opposition to the Defendant's Motion to Dismiss the First Amended Complaints, dated June 14, 2005 ("the Memorandum"), including the Declarations of Professors Ruth Wedgwood ("Wedgwood Declaration"), Yoram Dinstein ("Dinstein Declaration") and Mark A. Drumbl ("Drumbl Declaration"). My Opinion is provided on the basis of the Complaints and the Memorandum and is submitted in response to the three declarations.

QUALIFICATIONS AND EXPERIENCE

3. I offer this opinion in my personal capacity. I hold a permanent appointment as University Lecturer in Public International Law at the University of Oxford, United Kingdom (US equivalent: tenured Professor). I also serve as Course Director in Public International Law at the Oxford Foreign Service Program and as Adjunct Professor at the Universities of Georgia and Ohio. I specialize in research and teaching of public international law, including the law of international organizations, international criminal law, international environmental law, international humanitarian law, the law of the sea, international human rights law, and the foreign relations law of the European Union.

4. I was previously Assistant and Associate Professor at the University of Tubingen (Germany). I held visiting professorships at the Jaroslaw-Mudryi Academy in Charkow (Ukraine) (2001), the University Aix-Marseille III (France) (2002, 2003) and at Yeditepe University, Istanbul (Turkey) (2003, 2005). I have been elected visiting professor at the University Pantheon-Assas, Paris (France) and at the University of Canterbury (New Zealand). I serve on the editorial

board of the Chinese Journal of international Law and as academic adviser to Oxford University Press, Cambridge University Press and Hart Publishing. I have authored and edited five books and some 25 articles on topics of international law.

5. I am a practicing member of the German bar and regularly advise governments and private clients on questions of public international law and European law. My Resume is attached to this declaration.

INTRODUCTION

6. The purpose of this affidavit is to make available to the Court pertinent State practice, including United Nations documents and other material, that might otherwise not be familiar or readily available, and that is conspicuously absent from the declarations submitted in support of the plaintiffs' Memorandum.

7. I am instructed to assume for the purposes of this Declaration that the facts are as set out in the Complaints and the Memorandum. My understanding is that the question before the Court concerns whether Arab Bank could be held civilly liable under the Alien Tort Statute for the financing of terrorism by maintaining accounts for front organizations of Palestinian terrorist groups and for transferring money to the families of individuals conducting suicide bombings against soldiers and civilians in Israel and in Israeli-occupied territory. In such circumstances, I have been asked to address the question whether the financing of terrorism is a crime under customary international law (comparable to the crimes of torture and genocide).

8. In this declaration, I will deal with the following questions:

I. The Requirements of Crimes under Customary International Law [paras. 9-11]

II. The Elements of Customary International Law [12-14]

III. Evidence of a Rule of Customary International Law [15-16]

IV. Definition of Terrorism [17-63]

1. Declarations of States with Regard to Terrorism [17-31]

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I. THE REQUIREMENTS OF CRIMES UNDER CUSTOMARY INTERNATIONAL LAW

9. I have been asked to advise on whether financing of terrorism is a crime under customary international law. Crimes under customary or general international law have been defined by the International Law Commission of the United Nations as crimes "under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals."[1]

10. Crimes under customary international law must fulfil three conditions: (1) a violation of a rule of customary international law which is intended to protect values considered important by the international community of States; (2) the rule violated must entail the criminal responsibility of the person breaching the rule; and (3) the responsibility must emanate directly from customary international law without intermediate provisions of municipal law. As a consequence, the breach of such a rule may be punished by

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[1] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994: UN Doc. A/49/10, 1994, 66-67.

any State. The fact that a certain action has been condemned by the international community consequently does not suffice to establish the action as a crime under international law.

11. The proponent of a rule of customary international law has the burden of proof.[2] It is thus for the plaintiffs in the present action to prove that the financing of terrorism is prohibited under customary international law and that a violation of this rule entails, again under customary international law, the individual criminal responsibility of the person violating the rule.

II. THE ELEMENTS OF CUSTOMARY INTERNATIONAL LAW

12. International law sees customary international law rules as resulting from the combination of two elements: a "settled", i.e. an established, widespread and consistent practice on the part of States; and a psychological element known as *opinio juris sive necessitatis*, the perception on the part of States that the practice is required by a rule of law. The *Restatement of the Foreign Relations Law of the United States* provides in § 102 (2):

> Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[3]

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[2] See Ian Brownlie, *Principles of Public International Law* (6th edn., 2003), 12.

[3] American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States, vol.* 1 (1987), 24.

13. A practice can be general even if it is not universally followed. There is no precise formula how widespread a practice must be. Much depends on the circumstances of the case. Provided the consistency and generality of a practice arc proved, no particular duration is required but the passage of time is of course part of the evidence of generality and consistency.

14. It may be concluded that while complete uniformity and consistency of State practice is not required, substantial uniformity is; especially in cases such as international terrorism, which is of concern to all States. It seems striking that the State practice of a large segment of the international community which contradicts the plaintiffs' claims is practically ignored in the Declarations of Professors Wedgwood, Dinstein and Drumbl which reflect a rather narrow, western-centric view of international law.

III. EVIDENCE OF A RULE OF CUSTOMARY INTERNATIONAL LAW

15. The *Restatement of the Foreign Relations Law of the United States* provides in § 103 (1):

> Whether a rule has become international law is determined by evidence appropriate to the particular source from which the rule is alleged to derive [. . .].[4]

The Commentary in the *Restatement* provides that "for customary law the 'best evidence' is proof of state practice."[5] This must be read in conjunction with the comment that "explicit evidence of a sense of legal obligation (e.g. by official statements) is not necessary; *opinio juris* maybe inferred from acts or omissions",

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[4] Ibid., 35.

[5] Ibid., 36 (§ 103, Com a).

i.e. from State practice.[6] The sources of State practice are numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of the legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, State legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.[7]

16. Any rule that the financing of terrorism is a crime under customary international law which entails the individual criminal responsibility of the perpetrator must be proved by reference to the practice of States. Plaintiffs' experts fail to take sufficiently into account the practice of States in drawing their conclusion that the law of nations knows of a generally accepted definition of terrorism. In fact, only Professor Wedgwood engages in any meaningful, albeit limited, way with the declarations of Arab and Islamic States on the question of terrorism (Wedgwood Declaration, paras. 70-72 and 78-81). Professor Dinstein relies solely on a number of United Nations General Assembly and Security Council resolutions and the 1999 International Convention for the Suppression of the Financing of Terrorism (Dinstein Declaration, pp. 1-3) and

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[6] Ibid., 25 (§ 102, Com c).

[7] See Ian Brownlie, *Principles of Public International Law* (6th edn., 2003), 6.

Professor Drumbl touches only briefly on the position of two Arab States (Drumbl Declaration, para. 25).

IV. DEFINITION OF TERRORISM

1. DECLARATIONS OF STATES WITH REGARD TO TERRORISM

17. Plaintiffs' experts have maintained that there is a clear definition of terrorism in customary international law which meets the standard set out by the Supreme Court in *Sosa v. Alvarez-Machain.*[8] I respectfully beg to disagree with this conclusion. Contrary to what is claimed in the plaintiffs' Memorandum (at p. 62), the disagreement on the definition of international terrorism is not just "peripheral" or limited to "the margins" or merely concerns the "fringe" of a customary international law norm but goes right to the heart of the definition of terrorism.

18. Although the need or usefulness of a definition of "terrorism" has long been recognized, it has thus far proved impossible to adopt one. As Eric Rosand, the Deputy Legal Counselor at the United States Mission to the United Nations in New York, recently pointed out: "disputes over the definition of terrorism have left the negotiations on a draft comprehensive convention against international terrorism at a standstill for the past thirty-two years."[9] The lack of an agreed

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[8] See *Sosa* v. *Alvarez-Machain,* 124 S.Ct. 2739 at 2765-2766 (2004).

[9] Eric Rosand, 'The Security Counell as "Global Legislator": Ultra Vires or Ultra Innovative?', *Fordham International Law Review* 28 (2005), 542-590 at 549. See also ibid., 576: "negotiations on a comprehensive terrorism convention have been stalled for four years over two paragraphs in the text related to the definition of terrorism."

definition is generally acknowledged.[10] On December 5, 2001, the Parliamentary Under-Secretary of State at the British Foreign and Commonwealth Office wrote in reply to a parliamentary question:

> Setting up a new international criminal court or tribunal to try terrorism would cause great delay, not least since there is no internationally-agreed definition of terrorism.[11]

19. This position was confirmed more recently. On November 10, 2003, the British Minister for Europe stated in reply to a written parliamentary question put to the Secretary of State for Foreign and Commonwealth Affairs:

> An internationally agreed definition of terrorism would be beneficial and we are working in the UN [United Nations] to achieve one. But so deep is *the controversy surrounding certain groups,* an internationally agreed definition does not seem possible in the short term.[12]

---

[10] For example, on Sept. 13, 2004, Malaysia expressed concerns that "there is yet to be an internationally agreed definition of terrorism." (UN Doc. S/PV.5031, 13 September 2004, 30). In the Report on "Patterns of Global Terrorism – 2002", released by the U.S. Secretary of State and the Coordinator of Counterterrorism on Apr. 30, 2003, it says: "No one definition of terrorism has gained universal acceptance"; available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/> (Last visited July 18, 2005).

[11] United Kingdom, House of Commons, Debates, vol. 376, col. 313W: 5 December 2001.

[12] United Kingdom, House of Commons, Debates, vol. 414, col. 42W-43W: 10 November 2003 (emphasis added).

This statement is of particular interest as it shows that the disagreement of States is about who to label as a "terrorist." A substantial number of Arab, Islamic and African States excludes groups fighting foreign occupation or alien domination from the definition of terrorists; and especially Palestinian groups fighting "for self-determination and national liberation." These States cling to the political doctrine whereby so-called "freedom fighters" are entitled to avoid the stigma of terrorism on account of the political ends they pursue. The following statements and declarations may illustrate the position of theses States.

20. On October 3, 2001, the representative of Qatar declared in the United Nations General Assembly:

> In the absence of a specific definition of terrorism, we stress once again the need to differentiate between terrorism, which we strongly condemn, and acts of legitimate resistance and national struggle against foreign occupation. International law and the Charter of the United Nations have guaranteed the legitimate right of all peoples under foreign occupation and control to liberate their land. The absence of such a definition has also seriously undermined international efforts to tackle this grave threat to human society. A comprehensive legal definition of terrorism must make a clear distinction between terrorism, on one hand, and the legitimate struggle of peoples, on the other hand.[13]

[13] UN Doc. A/56/PV.17, 3 October 2001, 19.

21. Similarly, Lebanon in a letter to the United Nations Secretary-General, dated May 25, 2004, stated:

> Lebanon believes that the exercise of the right of peoples to resist occupation with a view to self-determination in accordance with the four Geneva Conventions does not constitute terrorism.[14]

22. At the meeting of the Sixth Committee (Legal) of the United Nations General Assembly on October 17, 2003, the representative of Morocco stated:

> [H]e regretted the lack of political will hindering the completion of work on a comprehensive convention against terrorism based on a text originally presented by India. Any attempt to define terrorism – one of the problems delaying agreement on the convention – must necessarily take account of the struggle of the Palestinian people and distinguish it from wanton terrorist acts such as those against the United States, Saudi Arabia and his own country.[15]

Saudi Arabia also stated that "the Palestinian struggle for self-determination should not be equated to acts of terrorism"[16] and several other States emphasized

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[14] UN Doc. A/59/130, 6 July 2004, 3, para. 9.

[15] The official verbatim record of the 7th meeting is not yet available on the Official Document System of the United Nations. Summaries of the statements made at the meeting of the Sixth Committee on Oct. 17, 2003 are available at <http://www.scienceblog.com/community/older/archives/L/2003/A/un030730.html> (last visited July 18, 2005).

[16] Ibid.

the difference between terrorism and the legitimate struggle of people against foreign occupation.[17]

23. At the 61st session of the Commission of Human Rights on March 18, 2005, the delegate of Pakistan declared that

> the right of peoples to self-determination was an inalienable right enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenants on Human Rights. It shielded the vulnerable against aggression, occupation and domination, and its denial caused suffering and instability. [. . .] To dismiss the Kashmiri freedom struggle as "cross-border terrorism" was an oversimplification. Characterizing the issue as part of the global problem of terrorism was at best disingenuous and at worst dangerous.[18]

24. Besides individual States, several Arab, Islamic, and African international governmental organizations have also expressed their views on the definition of terrorism. At a special session on international terror-

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[17] Algeria, Libya, Malaysia, Oman, Qatar.

[18] Commission on Human Rights, Sixty-first Session, Summary Record of the 13th Meeting, UN Doc. E/CN.4/2005/SR.13, 1 April 2005, 2. See also the Pakistani statement that a "legal and internationally agreed definition of terrorism still needs to be developed, and we hope that will be done by the General Assembly. As the United Nations has decided in the past that a distinction should he maintained between terrorism and the right of peoples to self-determination, the United Nations should not and cannot reverse its historical support for peoples and nations struggling for liberation from foreign occupation and alien domination." (UN Doc. S/PV.5059, 19 October 2004, 13).

ism in Malaysia on April 3, 2002, the Islamic Conference of Foreign Ministers, which represents the 56 Member States of the Organization of Islamic Conference (OIC) adopted the Kuala Lumpur Declaration on International Terrorism. The declaration provides in the relevant part:

> 7. We unequivocally condemn acts of international terrorism in all its forms and manifestations [. . .];
>
> 8. We reiterate the principled position under international law and the Charter of the United Nations of the legitimacy of resistance to foreign aggression and the struggle of peoples under colonial or alien domination and foreign occupation for national liberation and self-determination. In this context, we underline the urgency for an internationally agreed definition of terrorism, which differentiates such legitimate struggles from acts of terrorism;
>
> 10. We reject any attempt to link terrorism to the struggle of the Palestinian people in the exercise of their inalienable right to establish their independent state with Al-Quds Al-Sharif as its capital;
>
> 11. We reject any attempt to associate Islamic States or Palestinian and Lebanese resistance with terrorism which constitutes an impediment to the global struggle against terrorism; [. . .].[19]

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[19] See Letter dated April 4, 2002 from the permanent representative of Mali to the United Nations addressed to the Secretary-General, UN Doc. A/56/911-S12002/362, 8 April 2002,

25. More recently, on July 15, 2004, the Permanent Representative of Turkey to the United Nations, in his capacity as chairman of the Organization of Islamic Conference Group to the United Nations, transmitted the text of a resolution on combating international terrorism adopted by the Islamic Conference of Foreign Ministers at its thirty-first session, held in Istanbul, Turkey, in June 2004. In that resolution, the Islamic Conference of Foreign Ministers:

> 1. Affirms that the phenomenon of terrorism is antithetical to all the teaching of Islam which advocates tolerance and non-violence and enjoins against all forms of aggression, and above all the killing of human life, regardless of color, religion or race.
>
> 2. Calls again for the convening of an international conference under the aegis of the United Nations to set a definition for the concept of terrorism and distinguish it from the peoples' national liberation struggle.
>
> 3. Reiterates, in this connection, that the struggle of peoples plying under the yoke of

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Annex II, 5-6. See also the statement of the permanent representative of Malaysia to the United Nations at the annual coordination meeting of the Ministers of Foreign Affairs of the Organization of the Islamic Conference, 17 September 2002: "The definition [of terrorism] should distinctly distinguish acts of terrorism, from the legitimate struggles of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation – a right acknowledged under international law and resolutions of the United Nations. [. . .] We must not allow the legitimate struggle of the Palestinian people to be relegated to "terrorism" when the root cause is Israeli occupation and its practice of State terrorism"; available at <http://www.un.int/malaysia/GA/GA/GA17Sept02.html> (last visited June 29, 2005).

> foreign occupation and colonialism, to accede to national freedom and establish their right to self-determination, does not in any way constitute an act of terrorism.[20]

26. The League of Arab States in a report to the Counter-Terrorism Committee, dated April 26, 2004, also reaffirmed its support for a "definition of terrorism reflecting the distinction between terrorism and the right of peoples to resist foreign occupation."[21]

27. In the final communiqué adopted by the Supreme Council of the Gulf Cooperation Council (GCC)[22]

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[20] OIC Resolution No. 51/31-P on Combating International Terrorism, adopted on June 16, 2004; reproduced in UN Doc. A/58/856-S/2004/582, 21 July 2004, 138-139. For similar OIC statement see UN Doc. S/2004/345, 30 April 2004, 11; UN Doc. A/C.6/59/SR.7, 10 November 2004, 6, para. 24. See also the document "The Roots and Causes of Terrorism. An intervention prepared by the OIC as a contribution to the deliberations of the international conference on combating terrorism, Riyadh, 5-8 Feb 2005": "The new situation imposed on the Islamic world [after September 11, 2001] has also worsened the situations of Muslim peoples living under foreign occupation, such as the Palestinian people [. . .]. This is what has brought about the Islamic insistence and the demand by the Organization of the Islamic Conference for the need to hold an international conference under the auspices of the United Nations. Such a conference would be concerned with setting for terrorism a definition agreed upon by the international community and which would distinguish between terrorism and peoples' struggle for national liberation and for ending foreign occupation"; available at <http://www.oie-oci.org/index.asp> (last visited June 29, 2005).

[21] UN Doc. S/2004/345, 30 April 2004, 9 and 11.

[22] Members of the GCC are Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates.

at its twenty-fifth session, held in the Kingdom of Bahrain in December 2004, the Council declared:

> The Council reviewed the dangerous acts of terrorism that had been witnessed both in the region and elsewhere. In that context, the Council reiterated its condemnation and repudiation of terrorism in all its foul's, wherever it might occur and whatever its sources, motives or stated justifications might be. At the same time, the Council reaffirmed the clear and firm positions of the GCC countries on combating terrorism, cutting off its sources of financing by every available means and treating its causes and underlying motives, locally as well as regionally and internationally, and also drew attention to the need to distinguish between terrorism and the legitimate right of peoples to resist occupation, in accordance with the resolutions constituting international legitimacy.[23]

28. On April 6, 2005, Malawi speaking on behalf of the 53 Member States of the Group of African States at the United Nations said:

> In line with the Algiers Convention on the Prevention and Combating of Terrorism, terrorism cannot be justified under any circumstances. Political, philosophical, ideological, racial, ethnic, religious or other motives cannot be a justifiable defence for a terrorist

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[23] Letter dated Jan. 3, 2005 from the Permanent Representative of Bahrain to the United Nations addressed to the Secretary-General, UN Doe. A/59/663—S/2005/5, 6 January 2005, Annex, 5. See also the statement of Bahrain at UN Doc. S/PV.4710, 20 February 2003, 14.

> act. However, there is a difference between terrorism and legitimate struggle waged by people for their liberation or self-determination in accordance with the principles of international law.[24]

29. Numerous other statements both of individual States and international organizations could be added.[25] These statements show that some 80 Arab, Islamic and African States exclude the struggle of peoples for self-determination and against foreign or alien occupation, in general, and "the struggle of the Palestinian people in the exercise of their inalienable right to establish their independent state", in particular, from what they consider to be "terrorism." The financing of violent acts in the pursuit of these causes, in the understanding of these States, thus does not constitute financing of terrorism. The voting of these States on United Nations resolutions condemning terrorism or their ratification of treaties on combating and suppressing terrorism must be interpreted in the light of their understanding of "terrorism."

30. Professor Dinstein is, of course, correct in pointing out "that there is no such thing as 'good' terrorists in contradistinction to 'bad' terrorists" (Dinstein

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[24] UN Doc. A/59/PV.85, 6 April 2005, 22. See also the African Union Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, held in Algiers, 13-14 October 2004: "We underscore the need to differentiate between terrorism and the legitimate struggles of peoples for liberation, self-determination, freedom and independence, as recognized under international law." (AU Doe. Mtg/HLIG/Conv.Terror/Decl. (II) Rev. 2).

[25] See, e.g. UN Doc. AJC.3/58/SR.48, 25 March 2004, 4, para. 15; UN Doe. A/59/PV.22, 7 October 2004, 2 (Syria); UN Doc. S/PV.5059, 19 October 2004, 27 (Cuba).

Declaration, p. 2). However, this misses the point. As shown by the statements above, a substantial number of States does not distinguish between good terrorists and bad terrorists but between "terrorists" and "non-terrorists." Irrespective of whether one agrees with this position, the fact is that some 80 States do not regard as terrorists people involved in acts of national armed struggle and fighting foreign occupation.

31. The statement that sheds most light on the question of whether the financing of terrorism constitutes a crime under customary international law has been made, however, by a country that does not distinguish between terrorism and struggles of peoples for self-determination. Peru stated in its Report to the Counter-Terrorism Committee:

> Part of the problem of typifying the offence of international terrorism is that there is no international definition of terrorism, meaning that there is no common definition that might be acceptable to the international community when punishing citizens of countries other than Peru.[26]

If there were a clearly defined crime of international terrorism in customary international law, as Professors Wedgwood, Dinstein and Drumbl claim, Peru would not have had any difficulty in prescribing this crime in its domestic law and applying that law to foreign citizens.

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[26] UN Doc. S/2002/1085, 27 September 2002, 11.

2. EXCLUSION OF CERTAIN VIOLENT ACTS FROM TERRORISM IN THE REGIONAL CONVENTIONS ON COMBATING TERRORISM

32. In view of the Israeli-Palestinian conflict the 1998 Arab Convention on Combating Terrorism ("Arab Convention"), the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism ("OIC Convention"), and 1999 Convention of the Organization of African Unity on the Prevention and Combating of Terrorism ("OAU Convention") expressly exclude certain acts of violence from the scope of these conventions.[27] For example, Article 3 (1) of the OAU Convention provides:

> the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

Similar provision are found in Article 2(a) of the Arab Convention and Article 2(a) of the OIC Convention. The Arab League represents 10, the OIC 56[28] and the OAU (now: African Union) 52 member States.[29] The

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[27] The text of these conventions may be found in Sherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (2001).

[28] This number excludes the "State of Palestine" that is listed as a member of the Organization but does not fulfil the criteria of statehood in international law.

[29] This number does not include the 'Saharawi Arab Democratic Republic' which is listed as a member of the Organization but does not fulfil the criteria of statehood in international law. For a list of member States, see http://www.africa-union.org/home/Welcome.htm.

organizations under whose auspices these Conventions were drawn up have a membership of 80 States in total.[30]

3. UNITED NATIONS SECURITY COUNCIL RESOLUTIONS ON INTERNATIONAL TERRORISM

A. RESOLUTIONS CONDEMNING INTERNATIONAL TERRORISM

33. The UN Security Council has adopted numerous resolutions condemning international terrorism. These resolutions, however, do not contribute to the question of whether financing of terrorism is a crime under international law as they deal with different matters.

34. Several of these resolutions provide that "States shall freeze without delay the funds and other financial assets or economic resources" of particular persons or terrorist organizations or of persons who commit terrorist acts in general,[31] or "cut the flow of funds or

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[30] The States are: Afghanistan, Albania, Algeria, Angola, Azerbaijan, Bahrain, Bangladesh, Benin, Botswana, Brunei-Darussalam, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrghyzstan, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Suriname, Swaziland, Tajikistan, Tanzania, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Yemen, Zambia, Zimbabwe.

[31] See e.g. S/RES/1267 (1999) of 15 October 1999, para. 4 (b); S/RES/1333 (2000) of 19 December 2000, para. 8 (e); S/RES/1390

other financial assets and economic resources" to these persons or organizations.[32] Other resolutions call on States to take appropriate steps "to prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism"; "to deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition";[33] and "to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice [. . .] any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens."[34] In some resolutions the Council also "stresses that [. . .] the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations",[35] and "underlines the obligation on States to deny financial

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(2002) of 16 January 2002, para. 2 (a); S/RES/1373 (2001) of 28 September 2001, para. 1 (c). See also S/RES/1455 (2003) of 17 January 2003, paras. 1, 5; S/RES/1456 (2003) of 29 January 2003, Annex, para. 2 (c); S/RES/1526 (2004) of 30 January 2004, para. 1 (a).

[32] S/RES/1526 (2004) of 30 January 2004, para. 4.

[33] See e.g. S/RES/1269 (1999) of 19 October 1999, para. 4; S/RES/1373 (2001) of 28 September 2001, para. 2 (c).

[34] S/RES/1566 (2004) of 8 October 2004, para. 2.

[35] See e.g. S/RES/1377 (2001) of 12 November 2001, Annex, para. 6.

and all other forms of support and safe haven to terrorists and those supporting terrorism"[36] or reaffirms that "measures to detect and stem the flow of finance and funds for terrorist purposes must be urgently strengthened."[37] The resolutions impose obligations on States and not on individuals;[38] especially they do not establish any criminal liability of individuals directly under customary international law. Saying that an action is "contrary to the purposes and principles of the Charter of the United Nations" does not mean that it is a crime under customary international law.

B. RESOLUTION 1373 (2001)

35. The resolution most heavily relied on in the Declarations of Professors Wedgwood and Dinstein (Wedgwood declaration, paras. 63-72; Dinstein Declaration, pp. 1-2) is resolution 1373 (2001), adopted unanimously by the Security Council on September 28, 2001. The resolution which is binding upon all Member States of the United Nations under Chapter VII of the UN Charter provides in the relevant parts:

> *The Security Council, [. . .]*
>
> *Recognizing* the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means,

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[36] See e.g. S/RES/1377 (2001) of 12 November 2001, Annex, para. 11.

[37] S/RES/1456 (2003) of 29 January 2003, Annex, preambular para. 5.

[38] See also *supra* para. 36, with regard to Professor Wedgwood's misleading statement that resolution 1373 (2001) "implies correlative legal duties for private parties" (Wedgwood Declaration, paras. 67, 68).

the financing and preparation of any acts of terrorism, [. . .]

Decides that all States shall:

(a) Prevent and suppress the financing of *terrorist acts;*

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out *terrorist acts;* [. . .]

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of *terrorist acts,* of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; [. . .].[39]

This resolution was reaffirmed in several subsequent resolutions, and in resolution 1456 (2003) the Council restated that "States must bring to justice those who finance, plan, support or commit terrorist acts."[40]

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[39] S/RES/1373 (2001) of 28 September 2001 (emphasis added).

[40] S/RES/1456 (2003) of 29 January 2003, Annex, para. 3.

36. Resolution 1373 (2001) undoubtedly creates legal obligations for the Member States of the United Nations. The statement of Professor Wedgwood (Declaration, paras. 67, 68) that the resolution "implies correlative legal duties for private parties" is, however, not in conformity with present-day international law. The addressees of the obligations contained in Security Council resolutions are States not private parties. This is shown by the language of resolution 1373 (2001) where the Security Council decides that "all States" shall take certain actions. Nowhere in the resolution is there an obligation imposed on private parties (be it individuals or legal entities). It is generally accepted that binding resolutions of the Security Council are not self-executing and do not confer rights or impose duties on the individual citizens of the Member States.[41]

37. Resolution 1373 (2001) which was hailed as a "groundbreaking resolution",[42] a "landmark decision",[43] a "historic event"[44] was widely welcomed by States including the Arab States and the Observer for Palestine. States voting for the resolution included Tunisia,

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[41] See *Diggs* v. *Dent* (C.A.D.C. 1975), reported in *International Legal Materials* 14 (1975), 797, 803; *Diggs* v. *Richardson*, 555 F.2d 848, 850 (D.C. Cir. 1976); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311 (E.D.N.Y.1995). See also the statement of the U.S. Government in *Kangai* v. *Vance* (D.C. Cir. 1978), reported in *American Journal of International Law* 73 (1979), 297, 298.

[42] Turkey: UN Doc. A/56/PV.48, 12 November 2001, 9. See also the statement by Guatemala: UN Doc. A/56/PV.34, 31 October 2001, 13.

[43] Singapore: UN Doc. A/56/PV.25, 15 October 2001, 10.

[44] United Kingdom: UN Doc. S/PV. 4413, 12 November 2001, 15.

Bangladesh, Mali and Mauritius which were non-permanent members of the Security Council at the time. All four States had previously made it clear that they did not consider the struggle of peoples for self-determination and against foreign or alien occupation, in general, and the struggle of the Palestinian people in the exercise of their inalienable right to establish their independent state, in particular, to be terrorism. The representative of Morocco, speaking on behalf of the Arab States declared in a Security council debate on January 18, 2002:

> [. . .] the Arab Group is animated by the wish to make a positive, concrete contribution to international efforts against terrorism, in compliance with resolution 1373 (2001) of 28 September. As soon as this resolution was adopted, the Arab countries established all the national and regional mechanisms necessary to ensure the implementation of the provisions of the resolution in the best possible conditions. [. . .] They have adopted preventive and deterrent measures, including controls on suspicious sources of financing.[45]

There was, however, an important qualification to this statement. The Moroccan delegate continued:

> The Arab countries also believe that we must avoid any misuse of the term "terrorism" to serve particular interests in political disputes. [. . .] the international legal system grants the Palestinian people, whose most basic human rights are being flouted, the right to self-

[45] UN Docs. S/PV.4453, 18 January 2002, 22.

defence in the current difficult and sensitive conditions in the Middle East.[46]

38. The statement of the Moroccan delegate highlights the basic flaw of the resolution which allowed Arab, Islamic and other States to support the resolution and, at the same time, to maintain their position on the question of what constitutes terrorism. Although the language of the resolution can be and is read broadly by some States and scholars, the resolution only refers to the financing of "acts of terrorism" or "terrorist acts" without defining these terms. As the resolution does not give a definition of "terrorist acts" each member State can define terrorist acts under its domestic legislation. This enabled, for example, Syria and other Arab States to adopt the definition of terrorism contained in the Arab Convention on Combating Terrorism,[47] "which clearly distinguishe[s] between terrorism and legitimate struggle against foreign occupation" thereby excluding violent acts by groups such as Hamas, the Al-Aqsa Martyrs Brigades, or Islamic Jihad (which are seen as fighting the Israeli occupation of Arab territories in Palestine) from the application of resolution 1373 (2001).[48]

39. The ambiguity of resolution 1373 (2001) was apparently intentional. Eric Rosand, the Deputy Legal

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[46] Ibid., 23.

[47] See Arts. 1 and 2 of the Arab Convention on Combating Terrorism, 22 April 1998. The text is printed in Sherif Bassiouni, *International Terrorism: Multilateral Conventions, 1937-2001* (2001), 393-406.

[48] N Doe. S/PV.4453, 18 January 2002, 9 and 8: "foreign occupation is the most brutal form of terrorism; therefore, resistance to foreign occupation - especially Israeli occupation of Arab territories in Palestine, the Syrian Golan and southern Lebanon - constitutes legitimate struggle."

Counselor at the U.S. Mission to the United Nations in New York, wrote in 2005:

> In drafting Resolution 1373, the Council [. . .] avoided addressing those issues on which there was no consensus among the wider U.N. Membership. For example, it took care not to interfere with the ongoing General Assembly efforts to define terrorism, and thus Resolution 1373 allows each State to apply its own definition.[49]

Similarly, Professor Jane E. Stromseth remarked:

> Resolution 1373 requires states to take strong action against those who finance or engage in terrorist acts, but it does not define terrorist acts or terrorism. [. . .] But by not defining terrorism or terrorist acts, Resolution 1373 effectively allows member states to define terrorism in their domestic legislation. [. . .] the CTC's [Counter-Terrorism Committee's] ability to go beyond capacity building and to monitor whether states are in fact complying with their obligations to bring "to justice" and "deny safe haven" to those who commit "terrorist acts" will eventually confront the CTC with some of the same difficulties that the General Assembly's Sixth (Legal) Committee has confronted in its struggle to reach

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[49] Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', *Fordham International Law Review* 28 (2005), 542-590 at 581-582.

> agreement on a comprehensive convention on international terrorism.[50]

Professor Shibley Telhami has gone so far as to say that resolution 1373 "was possible only because member states did not have to tackle the issue of defining terrorism. [. . .] Many states among those voting for the resolution did not see eye to eye with the United States on such a definition."[51]

40. The fact that each State could apply its own definition of "terrorism" also explains why Arab, Islamic and African States can report without difficulty to the Counter-Terrorism Committee established under resolution 1373 that the financing of "terrorism" now constitutes a crime in their country (see Wedgwood Declaration, paras. 70-72). In its report to the Counter-Terrorism Committee, Syria stated:

> Inasmuch as Security Council resolution 1373 (2001) lacks any clear definition of the concept of terrorism or of the terrorist acts or entities to be combated, the Syrian Arab Republic has based itself, in the present reply, on its commitments under the 1998 Arab Convention for the Suppression of Terrorism, which distinguishes between terrorism and the legitimate struggle against foreign occupation, on its commitments under

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[50] Jane E. Stromseth, 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390', *ASIL Proceedings* 97 (2003), 41-45 at 44-45.

[51] Shilbey Telhami, 'Conflicting Views on Terrorism', *Cornell International Law Journal* 35 (2002), 581-598 at 584. See also Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism* (2005), 190 ("The resolution has, however, deliberately avoided the thorny issue of defining 'terrorism'").

> the international conventions against terrorism to which Syria is a party and on the provisions of Security Council resolution 1333 (2000) [. . .].[52]

41. Algeria, in its fourth report to the Counter-Terrorism Committee, reported on a "bill on combating money-laundering and the financing of terrorism" and other legislative acts. The report reads as follows:

> Following its ratification, the International Convention for the Suppression of the Financing of Terrorism applies to Algeria in its entirety. Article 18 of the Convention and paragraph 1 (a) of Security Council resolution 1373 (2001) apply to financial intermediaries and other agents authorized to conduct transactions in Algeria. [. . .]
>
> Algeria supports the definition of terrorism set forth in the Conventions of the Organization of African Unity (OAU) and League of Arab States, both of which it has ratified. *It is on these legal foundations,* and on the basis of investigations by the security services and the judicial authorities, that a terrorist organization is designated as such. [. . .]
>
> The legal provisions which are in place in Algeria are consistent with the country's commitment to combat terrorism and accord with ratified international instruments such as the Conventions of OAU and the League of Arab States.[53]

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[52] UN Doc. S/2002/1046, 19 September 2002, 3.

[53] UN Doc. S/2004/324, 23 April 2004, 12-13 (emphasis added).

The Arab and the OAU Conventions, of course, expressly excludes armed struggle against colonialism, occupation, aggression and domination by foreign forces from the definition of "terrorist acts." Similar provisos were made by other States.[54]

42. An initial review of the reports of States (not just Arab, Islamic and African States) submitted under resolution 1373 (2001) also points to another problem. Many States equate the "financing of terrorist acts" in para. 1 (a) of the resolution with money laundering, and deal with it only in that context. Money used to finance terrorism is not necessarily generated by illegal business transactions; on the contrary, assets and profits acquired by legitimate means and even declared to tax authorities can be used to finance terrorist attacks. Similarly, many States claimed that the crime of financing terrorism was covered by the criminal provisions on "aiding and abetting" or conspiracy. The Group of Experts examining the reports, however, has doubts whether these auxiliary offenses cover all acts of the financing of terrorism as set out in para. 1 (b) of the resolution.[55] Thus, while

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[54] See e.g. the statement of Lebanon: "In the preparation of the present report Lebanon has based itself on the distinction, as made in United Nations General Assembly resolution 46/51 of 19 January 1991 and in the 1998 Arab Convention for the Suppression of Terrorism, between terrorism on the one hand and the legitimate right of peoples to resist foreign occupation on the other [. . .]. On the basis of the foregoing and in accordance with the concepts mentioned, Lebanon addresses to the Committee its answers to [the questions corresponding to the relevant] operative paragraphs [of resolution 1373 (2001)]." (UN Doc. S/2001/1201, 13 December 2001, 2).

[55] Cf. Walter Gehr, Recurrent Issues (Briefing for Member States on 4 April 2002), at <http://www.un.org/Docs/sc/committees/1373/rc>.

many States have declared that they implemented the resolution, they have in fact not done so.[56]

43. Apart from these deficiencies, resolution 1373 (2001) does not proscribe the financing of (undefined) "terrorist acts" as a crime under international law but imposes obligations on States to criminalize the financing of such acts in their domestic laws.

C. RESOLUTION 1566 (2004)

44. Professor Wedgwood also relies on resolution 1566 (2004) adopted unanimously by the Security Council on October 8, 2004 (Wedgwood Declaration, paras. 93-100). Whereas the initial draft attempted to define terrorism,[57] the final text of the resolution (paragraph 3) only recalls that the following acts are under no circumstances justifiable:

> *criminal acts,* including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, *which constitute offences within the scope of and as defined in the international*

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[56] See Stefan Talmon, The Security Council as World Legislature, *American Journal of International Law* 99 (2005), 175-193 at 189-190.

[57] See John R. Crook, 'Contemporary Practice of the United States Relating to International Law', *American Journal of International Law* 99 (2005), 253-273 at 268.

> *conventions and protocols relating to terrorism.*[58]

As not all international conventions and protocols relating to terrorism are universally accepted, it is difficult to see how a definition which relies on sectoral *treaty-based* offenses can establish a generally accepted definition of terrorism under customary international law.

45. States made it quite clear that they did not consider paragraph 3 of resolution 1566 (2004) as prescribing a definition of terrorism. On January 18, 2005 the representative of Brazil declared:

> We believe that resolution 1566 (2004) reflects compromise language that contains a clear and important *political message*. Properly speaking, however, it should not be construed as a conceptual definition of terrorism. Furthermore, as foreseen in the Charter, we believe that reaching an agreed definition of terrorism falls under the functions and powers of the General Assembly.[59]

Another declaration of Brazil makes it clear that there is no generally agreed crime of terrorism under international law. On April 25, 2005, the Brazilian delegate on the Security Council stated:

> Without a consensus definition of terrorism, it is not appropriate to consider - as envisaged in resolution 1566 (2004) - possible practical measures regarding individuals, groups or entities involved in terrorist activities not

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[58] S/RES/1566 (2004) of 8 October 2004, para. 3.

[59] UN Doc. S/PV.5113, 18 January 2005, 13 (emphasis added). See also S/PV.5053, 8 October 2004, 7.

> covered by resolution 1267 (1999). Resolution 1566 (2004) reflects negotiated language that contains a clear and important political message, but it does not constitute a conceptual definition of terrorism and cannot be interpreted as such.[60]

Resolution 1267 (1999), of course, is specifically directed at Al-Qaeda and the Taliban in Afghanistan,[61] and does not deal with terrorism or terrorists in general.

46. Resolution 1566 (2004) was also criticized by Switzerland whose representative declared:

> Switzerland regrets that resolution 1566 (2004) contains formulations of a legislative nature that do not correspond to the definitions used in the draft comprehensive convention on international terrorism and in the 12 international conventions against terrorism; nor do they comply with the principle of legality in criminal law, which requires the clear and precise formulation of laws.[62]

47. As in the case of resolution 1373 (2001), the resolution was approved unanimously. States voting for the resolution included Algeria, Angola, Benin and Pakistan which were non-permanent Members of the Security Council at the time. All four States had previously made it clear that they did not consider the struggle of peoples for self-determination and against

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[60] UN Doc. S/PV.5168, 25 April 2005, 9.

[61] See S/RES/1267 (1999) of 15 October 1999. See also UN Doc. S/PV.5059, 19 October 2004, 11.

[62] UN Doc. S/PV.5059, 19 October 2004, 24-25. See also A/C.6/59/SR.7, 10 November 2004, 10, para. 52.

foreign or alien occupation to be terrorism. As these States had no problem in voting for the resolution it must be concluded that they considered the resolution not to cover acts in the struggle of peoples for self-determination and against foreign or alien occupation. This becomes clear from statements of the Algerian delegate in the Security Council. Algeria believes that the "resolution's main objective was to reaffirm the mobilization of the international community in fighting against that scourge and not to provide a definition of terrorism."[63] Speaking on October 19, 2004, the head of the Algerian delegation to the United Nations said:

> My delegation would like to reiterate its call for a definition of the phenomenon of terrorism. We also reiterate the need to distinguish between terrorist acts, which are condemnable and unjustifiable in all their forms and manifestations, and the legitimate struggle of peoples for liberation, self-determination, freedom and independence including through armed struggle, in accordance with international law. My delegation therefore believes that the criminal acts set out in paragraph 3 of resolution 1566 (2004) should not be interpreted as a definition of terrorism. It is not up to the Security Council to legislate in that regard. That prerogative falls under the competence of the General Assembly, which already has before it two draft conventions on

[63] UN Doc. S/PV.5113, 18 January 2005, 16.

terrorism, which we very much hope will soon be finalized.[64]

48. Irrespective of whether or not resolution 1566 (2004) contains a definition of terrorism, it should be pointed out that the language used by the Security Council in paragraph 3 of the resolution, employing the word *"recalls"* and *"calls upon"* instead of *"decides"*, shows that the Council did not intend to impose any legal obligation upon Member States to punish all the acts mentioned in the various conventions.

4. THE REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE

49. Both Professor Wedgwood (Declaration, paras. 82-92) and Professor Drumbl (Declaration, para. 26) rely extensively on the Report of the High-Level Panel, which was appointed by UN Secretary-General Kofi Annan in 2002, in their effort to show that there is a generally accepted definition of terrorism in customary international law.

50. The passages which Professor Wedgwood quotes from the Report of the High-Level Panel present, however, a highly selective picture. It should be noted that the Panel also had the following to say on the question of a definition of terrorism:

> The United Nations ability to develop a comprehensive strategy [against terrorism] has been constrained by the inability of Member-States to agree an anti-terrorism convention including a definition of terrorism. This prevents the United Nations from exerting its

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[64] UN Doc. S/PV.5059, 19 Oetober 2004, 17. See also UN Doc. A/C.6/59/SR.8, 24 January 2005, 12.

> moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes. [. . .]
>
> Lack of agreement on a clear an well-known definition undermines the normative [. . .] stance against terrorism [. . .].
>
> The search for an agreed definition usually stumbles on two issues. [. . .] The second objection is that peoples under foreign occupation have a right to resistance and a definition of terrorism should not override this right.[65]

This view was subsequently endorsed by the United Nations Secretary-General.[66]

51. As pointed out by the High-level Panel the lack of agreement on a definition of terrorism undermines the "normative stance" against terrorism. Without a definition of terrorism there cannot be a clear and definite norm prohibiting the financing of terrorism as it is unclear what acts may not be financed.

52. The High-Level Panel stated that "attacks that specifically target innocent civilians and noncombatants must be condemned clearly and unequivocally by

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[65] A more secure world: our shared responsibility. Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, 48, paras. 157, 159, 160.

[66] In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, UN Doc. A/59/2000, 21 March 2005, 26, pares. 90, 91. See also the Secretary-General's address to the Summit of the League of Arab States, 23 March 2005.

all."[67] The need for such a call shows that this is presently not the case. On the contrary, the Panel notes elsewhere that "far too many States remain outside the [counter-terrorism] conventions and not all countries ratifying the conventions proceed to adopt internal enforcement measures",[68] and that States in the regions from which terrorists originate are lacking the "will to fight terror."[69]

53. Referring to the work of the High-Level panel, Professor Wedgewood states that "the effort to craft a "comprehensive" convention on terrorism is thus not an attempt to change the law, but rather, to publicize what the law already is." (Declaration, para. 91). If it was only a question *of publicizing* the law, one wonders why it has not been possible to do so for the last thirty-two years.[70] It is rather, as the High-Level Panel rightly pointed out, the content of the definition which States are unable to agree upon.

54. Professor Drumbl states that the High-Level Panel "was able to *consolidate consensus* on a definition of terrorism" (Drumbl Declaration, para. 26 [emphasis added]). This is again misleading. All the High-Level Panel did, was to suggest elements a "definition of terrorism *should* include." That there did not yet exist any consensus on the definition of terrorism becomes clear from the following statement of the

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[67] Report of the High-Level Panel, para. 161.

[68] Ibid., para. 149.

[69] Ibid., para. 147.

[70] See Eric Rosand, "The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?", *Fordham International Law Review* 28 (2005), 542-590 at 549.

Panel: "[w]e believe there is particular value in *achieving* a consensus definition within the General Assembly, given its unique legitimacy in normative terms.[71]

55. With regard to the question of whether terrorism is a crime under customary international law, the following passage from the Report of the High-Level Panel is instructive:

> The definition of terrorism should include the following elements: [. . .]
>
> (b) *Restatement* that acts under the 12 preceding anti-terrorism conventions are terrorism, and a *declaration* that they are a crime under international law; and *restatement* that terrorism in time of aimed conflict is prohibited by the Geneva Conventions and Protocols.[72]

The High-Level Panel distinguishes in its recommendations between the "restatement" that certain acts are terrorism and a "declaration" that they are a crime under international law. This shows that the latter is not yet established in customary international law.

5. DRAFTING HISTORY OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

56. The drafting history of the Statute of the International Criminal Court also sheds some light on the question whether terrorism or the financing of terrorism qualifies as a crime under customary international law. In 1993, the International Law Commission proposed that a future international criminal

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[71] Report of the High-Level Panel, para. 162 (emphasis added).

[72] Ibid., para. 164 (emphasis added).

court should be given jurisdiction over crimes under general international law in general. This proposal met with considerable criticism from States on the grounds that a mere reference to "crimes under general international" law was highly uncertain. The Commission therefore limited the Court's jurisdiction over crimes under general international law to a number of specified crimes that were generally accepted. As crimes under general international law the Commission identified the following: genocide, aggression, violations of the laws and customs applicable in armed conflict and crimes against humanity. In addition, the Court was to have jurisdiction over so-called "treaty crimes", crimes under treaties which provide for the suppression of undesirable conduct of international concern constituting *crimes under national law*. Six of the fourteen treaty crimes concerned terrorist offenses (e.g. hijacking, hostage-taking). The importance of the systematic factor of distinguishing the two types of crimes was stressed by a number of members of the Commission, in particular in the context of crimes associated with terrorist activity. It was pointed out that "as yet the international community has not yet developed a single definition of terrorism."

57. The Bureau of the Rome Conference on the International Criminal Court also distinguished between genocide, crimes against humanity, war crimes and aggression on the one hand and treaty crimes such as terrorism on the other.[73] The "crime of terrorism" was included in brackets, without prejudice to a final

[73] UN Doc. A/CONF.183/C.1/L.59, 10 July 1998, 1; UN Doc. A/CONF.183/C.1/L.53, 6 July 1998, 1.

decision on its inclusion in the Statute, in the draft Statute of the International Criminal Court that was the basis of the work of the Rome Conference.[74] At the plenary meetings of the Conference and those of its Committee of the Whole the majority of representatives (including those belonging to the Western European and others Group) opposed the inclusion of the crime of terrorism in the Statute. The reason for its final exclusion was again the failure of the Conference to reach a generally acceptable definition of terrorism. Thus, in the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on July 17, 1998, the Conference regrets that "no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court."[75]

6. WRITINGS OF SCHOLARS

58. The writings of scholars has been identified in the *Restatement of the Foreign Relations Law of the United States* as one of the secondary means of proving that a rule has become customary international law.[76] Professor Ian Brownlie, the leading British authority on public international law wrote in the 6th edition

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[74] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/ Add.1, 14 April 1998, 27-28.

[75] See Resolution E of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10, 17 July 1998, 8.

[76] American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States,* vol. 1 (1987), 36 (§ 103 (2) (c) Com a).

of his textbook in 2003 with regard to international crimes:

> There is, at this stage in the historical development of the concept of international crimes, sufficient material to provide a reliable assessment of those offences which are recognized as part of general or customary international law. In this context the provisions of the Statute of the International Criminal Court constitute good evidence of the offences forming part of general international law.[77]

He then lists genocide, crimes against humanity, war crimes and aggression as crimes forming part of general international law. To this list he adds torture in time of peace as a separate international crime.[78] An admittedly limited survey or textbooks published in the last two years shows that Professor Brownlie's view is shared by other leading authorities who also mention only genocide, war crimes, crimes against humanity, aggression and piracy as offenses established under customary international law.[79]

59. A recent doctoral dissertation on *Defining "Terrorism" in International Law* presented by Dr.

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[77] Ian Brownlie, *Principles of Public International Law* (6th edn., 2003), 561.

[78] Ibid., 561-564.

[79] See Martin Dixon, *Textbook on International Law* (2005), 114-115; Hanspeter Neuhold, Waldemar Hummer, Christoph Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts [Austrian Handbook on International Law]* (2004), 533; Stephan Hobe, Otto Kimminich, *Einfuhrung in das Völkerrecht [Introduction to International Law]* (2004), 251-255.

Ben Saul concludes: "Arguments that terrorism is a customary international law crime are premature."[80]

60. Dr. Saul's conclusion is shared by Douglas R. Burgess Jr. who writes:

> International law lacks a definition for terrorism as a crime. [. . .] This gives an out to countries that harbor terrorists and declare them "freedom fighters." [. . .] The overall situation is, in a word, anarchic. This chaotic state is reflected in, and caused by, the tortuous machinations of the U.N. in defining terrorism. Over 40 years of debate have produced a plethora of conventions proscribing acts ranging from hijacking to financing terrorist organizations. But the U.N. remains deadlocked on what a terrorist is. [. . .] What is needed now is a framework for an international crime of terrorism. The framework should be incorporated into the U.N. Convention on Terrorism and should call for including the crime in domestic criminal law and perhaps the jurisdiction of the International Criminal Court.[81]

61. Professor Javaid Rehman, in his book on *Islamic State Practices, International Law and the Threat from Terrorism* (2005), concludes the chapter

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[80] Ben Saul, *Defining "Terrorism" in International Law* (doctoral thesis, Oxford University, 2005), 210. See also Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004', *Chinese Journal of International Law* 4 (2005), 141-166 at 166 ("It is still premature to claim universal jurisdiction over terrorism, given the absence of an agreed definition [. . .]").

[81] Douglas R. Burgess Jr., 'The Dread Pirate Bin Laden: How thinking of terrorists as pirates can help win the war on terror', *Legal Affairs* Jul-Aug. 2005, 32-36 at 32.

on "Financing of International Terrorism" with the following statement:

> Financing of terrorism unfortunately remains a major concern for the international community. [. . .] It is also the case that sometimes, differing perceptions of the cause lead States to take diametrically opposed views. The issue of the struggle of the Palestinians is a pertinent example. Israel and its allies may regard any form of financial support for the Palestinian cause as promoting terrorism; in their view any organization and institution working to finance the Palestinians' struggle for their lawful rights is promoting terrorism. The Islamic community, however, firmly believes in the integrity of the right of self-determination of the people of Palestine.[82]

62. In an examination why international terrorism is missing from the Statute of the International Criminal Court, Patrick Robinson, a Judge on the International Criminal Tribunal for the Former Yugoslavia,

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[82] Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism* (2005), 190. See also ibid., 184 ("The definition of terrorism and the identification of terrorists have clearly been problematic for Islamic States. There remains a major debate on the position of such organizations as *Anasar-al-Islam*, *Hizbollah*, and the *Palestinian Islamic Jihad*. The US has recently placed these organizations on its list of proscribed groups, and has required their financial assets be frozen. On the other hand, many Arab and Islamic States regard *Hizbollah* and the *Palestinian Islamic Jihad* as genuine liberation movements.").

writes about "The Place of the Crime of International Terrorism in International law":

> The absence of a generally acceptable definition of international terrorism complicates the assessment of its place in international law. [. . .] The international legal regime on terrorism has, however, in the absence of a global treaty on the subject been developed mainly through the adoption of treaties devoted to the suppression of specific terrorist acts; at that level there is, therefore, a strong conventional regime on terrorist acts. The question is whether anything in that regime reflects customary international law, or indeed, whether, quite apart from that regime, there is any other basis for concluding that there is a customary rule proscribing terrorism.

After a careful analysis of various United Nations General Assembly resolutions dealing with terrorism, he concludes that these resolutions may be viewed as establishing a customary rule which not only criminalizes as terrorist, acts intended or calculated to provoke a state of terror, but also requires States to take certain action to prevent and punish these acts. This finding is, however, subject to the important qualification that

> international law excludes from the concept of terrorism the struggle for self-determination and independence, although some acts perpetrated in that struggle may themselves be terrorist and unlawful.[83]

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[83] Patrick Robinson, The Missing Crimes, in: Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (2002), 497-525 at 518-521.

63. There seems to be only one leading authority, Antonio Cassese, who, subject to certain conditions, has advocated terrorism as a crime under customary international law. For terrorist acts to amount to international crimes, according to Cassese, the acts must, "transcend national boundaries" and must be "carried out with the support, the toleration, or the acquiescence of the State where the terrorist organization is located or of a foreign State." The author does not give any evidence for his view or for the conditions he specifies.[84] Even Cassese, however, does not mention the financing of terrorism as a crime under customary international law.

V. THE FINANCING OF TERRORISM

1. MEASURES TAKEN BY STATES AGAINST THE FINANCING OF TERRORISM

64. There is no constant and uniform practice of States with regard to the financing of terrorism that allows international lawyers to establish a clear rule of customary international law. Measures taken by States against the financing of terrorism vary widely,[85] and often no measures are taken at all. Whether measures are taken depends on what States regard as "terrorism" and what is considered as "financing" of terrorism. Considering their view on terrorism, it comes as no surprise that countries like Saudi Arabia have reported to the Counter-Terrorism Committee of the United Nations Security Council that "there have

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[84] Antonio *Cassese, International Criminal Law* (2003), 128-130. See also Antonio Cassese, *International Law* (2nd edn., 2005), 449-450.

[85] See United Nations, *National Laws and Regulations on the Prevention and Suppression of International Terrorism,* Part I (2002).

been no successful prosecutions involving the provision of financial assistance for the carrying out of terrorist acts, whether within or outside the territory of Saudi Arabia."[86] In reply to the question whether there are any generally applicable procedures for the freezing and provisional seizure of assets for offenses relating to terrorism and its financing, Saudi Arabia replied:

> In the absence of a precise and unequivocal definition of terrorism endorsed by the international community, in Saudi Arabia measures for the freezing and seizure of funds can only be taken in accordance with specific statutory procedures and on the basis of a request from the Minister of the Interior addressed to the Minister of Finance and National Economy.[87]

The question who is a terrorist is thus effectively decided by the Saudi Minister of the Interior on an *ad hoc* basis.

65. There are also many States which distinguish between funding political, religious, charitable and educational activities and the financing of terrorism. For example, the spokesman for the European Commission explained on June 23, 2003 why fund-raising activities by Hamas were not prohibited: "You can't say that the whole of Hamas is a terrorist organization and certainly that is not our position."[88]

66. The United Nations High-Level Panel on Threats, Challenges and Change summarized in its

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[86] UN Doc. S/2002/869, 1 August 2002, 4.

[87] UN Doc. S/2002/869, 1 August 2002, 5.

[88] EU rejects full Harms ban, BBC News, at <http://news.bbc.co.uk/1/hi/world/europe/3026992.stm>.

Report published in December 2004 the situation with regard to the measures taken against the financing of terrorism as follows:

> [. . .] attempts to address the problem of terrorist financing have been inadequate. While in the three months after 11 September 2001 $112 million in alleged terrorist funds were frozen, only $24 million were frozen in the two years that followed.
>
> [. . .] a number of States are lagging behind in their compliance with the directives of the Counter-Terrorism Committee.[89]

2. THE QUESTION OF FINANCING TERRORISM IN THE REGIONAL CONVENTIONS ON COMBATING TERRORISM

67. Since the 1970s, several regional conventions on the prevention and combating of terrorism have been concluded. These conventions include:

(1) Convention of the Organization of American States to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance, February 2, 1971; entry into force October 16, 1973 ("OAS Convention")

(2) European Convention on the Suppression of Terrorism, January 27, 1977;

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[89] A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, 46, para. 149 and 48, para. 153.

entry into force August 4, 1978 ("European Convention")[90]

(3) Regional Convention on Suppression of Terrorism of the South Asian Association for Regional Cooperation, November 4, 1987; entry into force August 22, 1988 ("SAARC Convention")[91]

(4) Arab Convention on Combating Terrorism, April 22, 1998; entry into force May 7, 1999 ("Arab Convention")

(5) Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999; entry into force by country, first entry into force October 3, 2000 ("CIS Treaty")

(6) Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999; entry into force November 7, 2002 ("OIC Convention")

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[90] The Protocol amending the European Convention on the Suppression of Terrorism, done on May 15, 2003, has not yet entered into force. For the text, see <http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm> (last visited July 18, 2005). Parties are obliged to establish their jurisdiction, inter alia, over offenses within the meaning of the 1999 Terrorist Financing Convention.

[91] The Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, done on January 6, 2004, has not yet entered into force. For the text, see <http://www.saarc-sec.org/main.php?id=11&t=7.1> (last visited July 18, 2005). Terrorist financing is an offense under the Protocol; see Article 4.

(7) Convention of the Organization of African Unity on the Prevention and Combating of Terrorism, July 14, 1999; entry into force December 6, 2002 ("OAU Convention")[92]

(8) Agreement on Cooperation among the Governments of GUUAM[93] Member States in the Field of Combat Against Terrorism, Organized Crime and Other Dangerous Types of Crime, July 20, 2002 ("GUUAM Agreement")[94]

(9) Inter-American Convention against Terrorism, June 3, 2002; entry into force July 10, 2003 ("Inter-American Convention")[95]

68. Several of these regional treaties on terrorism do not mention the financing of terrorism at all (OAS Convention, European Convention, SAARC Convention, CIS Convention, GUUAM Agreement). The treaties that do mention the financing of terrorism do so in the context of establishing an obligation of the *contracting States* to "refrain from any acts aimed at [. . .]

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[92] The text of all these conventions may be found in Sherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (2001).

[93] GUUAM is a regional organization of five States: Georgia, Ukraine, Uzbekistan, Azerbaijan and Moldova.

[94] For the text of the Agreement, see <http://www.guuam.org.ua/cgi-bin/valmenu_guuam.sh?1p030103.html> (last visited July 18, 2005).

[95] As of July 18, 2005 only 12 of the 36 OAS Member States are parties to the Convention. The Text of the convention may be found at <http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm> (last visited July 18, 2005).

financing [. . .] terrorist acts"[96], "not to [. . .] finance [. . .] terrorist acts"[97], "not to [...] participate in any form in [. . .] financing [. . .] terrorist acts."[98] The OIC Convention, in addition, provides that "money laundering aimed at financing terrorist objectives shall be considered terrorist crimes."[99] The Inter-American Convention obligates each State party to "ensure that its domestic penal money laundering legislation also includes as predicate offenses those offenses established in the international [anti-terrorism] instruments."[100] Only the 2004 Additional Protocol to the SAARC Convention[101] and the 2005 Council of Europe Convention on the Financing of Terrorism,[102] neither of which has yet entered into force, expressly require the parties to adopt domestic legislation with regard to the "financing of terrorism." However, none of the regional anti-terrorism conventions prescribes terrorist financing as an international crime. Upon signing the Inter-American Convention, Ecuador expressly "deplore[d] that the member states have not been able to reach a consensus on the definition of terrorism and

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[96] Article 4 (1) OAU Convention.

[97] Article 3 Arab Convention.

[98] Article 3 (1) OIC Convention.

[99] Article 2 (d) OIC Convention.

[100] Article 6(1) Inter-American Convention.

[101] See Articles 7-9 SAARC Additional Protocol.

[102] See Articles 2, 9 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw, May 16, 2005; CETS 198. For the text, see <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm> (last visited July 18, 2005).

its classification as an international crime against humanity."[103]

3. INTERNATIONAL TERRORIST FINANCING CONVENTION

A. STATUS OF THE CONVENTION IN INTERNATIONAL LAW

69. The Declarations submitted on behalf of the plaintiffs deal at length with the International Convention for the Suppression of the Financing of Terrorism ("Financing Convention") (Wedgwood Declaration, paras. 73-81; Dinstein Declaration, pp. 2-3; Drumbl Declaration, paras. 19-25). The Convention was adopted by UN General Assembly Resolution 54/109 of December 9, 1999.[104] Article 2(1) of the Convention provides:

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to

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[103] For the Ecuadorian declaration of June 3, 2003, see <http://www.oas.org/juridico/english/sigs/a-66.html> (last visited July 18, 2005).

[104] A typo has crept into Professor Wedgwood's Declaration at para. 73: the Financing Convention is dated Dec. 9, 1999 (not: 1991).

> any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

70. One of the conventions listed in the annex mentioned in Article 2(1)(a) is the International Convention for the Suppression of Terrorist Bombings ("Bombings Convention"), adopted by the General Assembly of the United Nations on December 15, 1997. According to Article 2(1) of that Convention,

> any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State government facility, a public transportation system or an infrastructure facility
>
> (a) With the intent to cause death or serious bodily injury; or
>
> (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

71. Reading the two Conventions together, this means that any person commits an offense within the meaning of the Financing Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they

are to be used, in full or in part, in order to carry out bombings in the sense of Article 2(1) of the Bombings Convention or any of the acts mentioned in Article 2(1)(b) of the Financing Convention.

72. The Financing Convention is a treaty and, as such, is binding only on the parties to the Convention.[105] The Convention entered into force on April 10, 2002. As of July 18, 2005, the Convention had 138 parties. The table shows the development in the number of parties since the adoption of the Convention in December 1999:

Year	Accessions or Ratifications	Total Number of Parties
2000	2	2
2001	14	16
2002	48	64
2003	43	107
2004	25	132
(July 18) 2005	6	138

Many Arab and Islamic countries such as Bangladesh, Indonesia, Iran, Iraq, Kuwait, Lebanon, Malaysia, Oman, Pakistan, Qatar, Saudi Arabia, the United Arab Emirates and Yemen are still not parties to the Financing Convention. Other notable absentees include Argentina, Brazil, China, and the Czech Republic. Thus, a sizable segment of the international community of States representing some 2.6 billion people or 40% of the world population is still outside the convention regime.

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[105] See Article 34 of the Vienna Convention on the Law of Treaties, done on May 23, 1969: 1155 UNTS 331.

73. Several State parties to the Financing Convention have made declarations under Article 2(2)(a) declaring that the Bombings Convention should be deemed not be included in the list of terrorist conventions to which the Convention applies. Such declarations cease to have effect as soon as the Bombings Convention enters into force for the party making the declaration. As of July 18, 2005, nine such declarations were still in force.[106] On July 18, 2005, the Bombings Convention had 139 parties; again many Arab and Islamic States not being parties.[107] This means that for 62 States, or roughly 30% of States, the financing of bombings within the meaning of the Bombing Convention is not yet a treaty offense.

74. It is thus grossly misleading when Professor Drumbl writes that "only four countries with populations larger than 13 million remain outside of both treaty regimes", i.e. outside the Financing and the Bombing Conventions (Drumbl Declaration, para. 19). First, one may ask why the – arbitrary – figure of "13 million" was chosen. The answer is that it allows Professor Drumbl to exclude a substantial number of smaller States which are not parties to the conventions from the picture of almost universal acceptance of the conventions which he attempts to paint. Secondly, one may ask what it means "to remain outside" of both treaty regimes. According to Professor Drumbl, States "outside" a treaty regime are States that "have not signed nor acceded to, approved, or accepted" the conventions. Those that have signed the conventions he

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[106] The States in question are the Cook Islands, Egypt, Jordan, Moldova, Saint Vincent and the Grenadines, Singapore, Syria, Thailand and Viet Nam.

[107] For example, Egypt, Indonesia, Iran, Iraq, Jordan, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria.

terms "*participants* in the conventions" (Drumbl Declaration, para. 20 [emphasis added]). This leads him to state that "159 states are participants in the Financing Convention and 142 are participants in the Bombing Convention." The law of treaties, however, does not know of "participants" in conventions but only knows of "parties" to a convention. Article 2(1)(g) of the 1969 Vienna Convention on the Law of Treaties defines a "party" to a treaty as "a State which has consented to be bound by the treaty and for which the treaty is in force." States that have signed but have not ratified, accepted, approved, or acceded to a treaty are not bound by it. Such States are only under an obligation "to refrain from acts which would defeat the object and purpose" of the treaty.[108] The United States has signed numerous treaties which it has never ratified.[109] Does the signing of these treaties mean that the United States has become a "participant" in these treaties and that by signing the treaties it wanted to be bound by them or to contribute to the creation of customary international law? Certainly not. This is shown by the fact that States that have signed a treaty are free to make their intention clear not to become a party to the treaty as was done by the United States on May 6, 2002, when it declared that it no longer wanted to become a party to the Rome Statute of the International Criminal Court which it had signed on December 31, 2000. Thus, to say that the United States for two years was a "participant" in

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[108] Vienna Convention on the Law of Treaties, Art. 18(a).

[109] See e.g. the 1966 International Convention on Economic, Social and Cultural Rights (signed on Oct. 5, 1977), 1979 Convention on the Elimination of All Forms of Discrimination of Women (signed on July 17, 1980), 1989 Convention on the Rights of the Child (signed on Feb. 16, 1995), 1998 Rome Statute of the International Criminal Court (signed Dec. 31, 2000).

the Rome Statute is not very helpful. Thirdly, Professor Drumbl's statement that among the non-parties of the two conventions "are a number of states with starkly dubious human rights records, rogue governments, and illegitimate regimes" (Drumbl Declaration, para. 19) is of no concern to the question of whether a treaty is reflective of or is crystalizing customary international law. One may consider outdated the "one-nation, one-vote principle", where every State has the same right to participate in the creation of rule of customary international law; it is nevertheless still a basic principle of international law. It must be put on record once again that, despite all creative scholarship on the part of Professor Drumbl, for roughly 30% of all States the financing of bombings within the meaning of the Bombing Convention is not yet a treaty offense; let alone an offense under customary international law.

75. Three Arab States have made express declaration upon signing or ratifying the Financing Convention.[110] For example, Jordan made the following declaration upon signature of the Convention:

> The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1(b) of article 2 of the Convention. [. . .].[111]

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[110] According to Professor Drumbl "only two States, Jordan and Syria, contested the general definition of terrorism set out in art. 2(1)(b)" (Drumbl Declaration, para. 25). For Egypt's declaration see, *infra* n. 112.

[111] All declarations are available at <http://untreaty.un.org/>.

Similar declarations were made by Egypt [112] and Syria,[113] and in the context of the Bombing Convention, by Pakistan.[114] In view of the above statements of Arab, Islamic and African States, it is to be assumed that these States have similar provisos, although not expressly declared.

76. While I would agree with Professor Wedgwood that these "declarations" are probably not admissible as "reservations" under the Financing Convention and they definitely cannot change the United States' obligations under the Convention (Wedgwood Declaration, paras. 78, 80), they are nevertheless a clear expression of *opinio juris* on the part of these States

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[112] The Egyptian reservation reads: "Without prejudice to the principles and norms of general international law and the relevant United Nations resolutions, the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of article 2, subparagraph (b), of the Convention."

[113] The Syrian reservation reads: "A reservation concerning the provisions of its article 2, paragraph 1 (b), inasmuch as the Syrian Arab Republic considers that acts of resistance to foreign occupation are not included under acts of terrorism."

[114] The Pakistani declaration reads: "The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded in conflict with an existing *jus cogens* or peremptory norm of international law is void and, the right of self-determination is universally recognized as *a jus cogens*."

that acts of national armed struggle and fighting foreign occupation in the exercise of a people's right to self-determination are not regarded as "terrorist acts." The "declarations" make it clear that these States do not consider themselves obligated by international law to take action against such acts or the financing of such acts; a fact that is also reflected in the practice of these States.

77. At the time of its adoption, the Financing Convention neither codified existing customary international law nor did it have a crystalizing effect on nascent customary international law rules that could be found in the practice of States prior to the adoption of the Convention. This is demonstrated by the fact that until the terrorist attacks of September 11, 2001, almost two years after its adoption by the General Assembly, only four States had become parties to the Convention.

78. The Convention or its Article 2(1) also has not developed into customary international law since its adoption. As the International Court of Justice pointed out: "There is no doubt that this process is a perfectly possible one and does from time to time occur" but "this result is not lightly to be regarded as having been attained."[115] For this result to be attained, the Court required the conventional rule in question to be of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[116] This must be open to some considerable doubt in the present case. Article 2(1)(a) refers to offenses established under a number of treaties which can be

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[115] *North Sea Continental Shelf*, ICJ Reports (1969), 3 at 41, para. 71.

[116] Ibid., 42, para. 72.

amended by the parties to the Financing Convention. This is an unusual element in what is supposed to be a potential general rule of international law. The content of customary rule would in effect depend on the parties to the Financing Convention. In addition, Article 2(2)(a) allows State parties to the Convention to exclude some or all of the offenses referred to in Article 2(1)(a). Article 2 also requires that the funds have been provided "unlawfully" without specifying how to determine the unlawfulness of the conduct in question. It should be noted that during the discussions of the Working Group preparing the Convention delegates pointed to "the distinction between terrorist acts and the lawful acts of national liberation movements."[117] It has been pointed out that the unlawfulness of the conduct would have to be determined in accordance with national law,[118] an element which again makes it difficult to regard the rule as a general one.

79. In addition, the Court required a "very widespread and representative participation in the convention" of States whose interests are affected by the subject matter of the convention. With regard to terrorism the interests of all States are affected. Of the 191 member States of the United Nations, as of July 18, 2005, only 138 are parties to the Financing Convention.

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[117] Measures to eliminate international terrorism. Report of the Working Group, UN Doc. A/C.6/54/L.2, 26 October 1999, 61, para. 81.

[118] Roberto Lavalle, The International Convention for the Suppression of the Financing of Terrorism, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 60 (2000), 491-510 at 500-501.

80. Even more important, the Court considered it an "indispensable requirement" that

> State practice [especially the practice of *States that were not parties to the convention*] should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or general obligation is involved.

There is no evidence in the present case that there is "extensive and virtually uniform" practice of *non-parties* to the Financing Convention establishing the offenses set forth in Article 2(1) of the Convention (including violent acts in the struggle for self-determination or against foreign or alien occupation) as criminal offenses under their domestic law and that this practice is based on their belief that States are required to do so by international law.

81. Both the Financing Convention and the Bombings Convention have been included by the United Nations Secretary-General in this year's annual treaty event, *Focus 2005: Responding to Global Challenges*.[119] It is thus to be expected that the number of State parties to these Conventions will increase further in the months to come. The question we are concerned with in the present case is, however, not one of mere numbers of parties to a treaty but of the content of the treaty in question and of the interpretation of the provisions of the treaty adopted by States. The declarations of States set out above show that many parties

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[119] See United Nations, *Multilateral Treaty Framework: An Invitation to Universal Participation. Focus 2005: Responding to Global Challenges* (2005), 63 and 67.

to the Conventions expressly exclude the struggle for self-determination from terrorism and thus from the application of the Conventions.

B. CONTENT OF THE CONVENTION

82. Even if the Financing Convention had developed into customary international law since its adoption in December 1999, neither Article 2 nor any other provision prescribes the financing of terrorist acts as a crime under international law. The Financing Convention provides that any person who commits one of the acts set out in Article 2 commits *an offense "within the meaning of the Convention"* and in Article 4 imposes an obligation upon State Parties to establish as criminal offenses under their *"domestic law"* the offenses set forth in Article 2.

83. Crimes under international law may be prosecuted and punished by any State which obtains custody of the perpetrator, regardless of a territorial or nationality link with the perpetrator or his victims.[120] Article 7 of the Convention, however, limits the jurisdiction of State Parties to offenses which have some kind of linkage with them. When prosecuting or punishing the offenses under the Financing Convention States exercise their national, not international jurisdiction, as they would do in case of international crimes.[121]

84. In addition, Article 7(2) of the Convention *allows, but does not oblige*, State Parties to establish

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[120] See Antonio Cassese, *International Lou'* (2nd edn., 2005), 436.

[121] See Ian Brownlie, *Principles of Public International Law* (6th edn., 2003), 303-305.

jurisdiction over the offenses set forth in Article 2 in a number of circumstances where there is a (less direct) connection between the offense, or the offender, and the State Party concerned. Leaving it to individual States whether or not to take action against the financing of terrorism evidences that it is not a crime under customary international law.

85. Article 21 of the Convention provides that "nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions." This savings clause allows Arab, Islamic and African States to argue that the Convention leaves untouched the right of individuals to resist foreign occupation, as "international law and the Charter of the United Nations have guaranteed the legitimate right of all peoples under foreign occupation and control to liberate their land."[122]

CONCLUSION

86. I am of the opinion that while there is widespread condemnation of international terrorism and the financing of terrorism, "terrorism" and the "financing of terrorism" have not yet been established as crimes under customary international law for the following reasons:

(1) the above survey of State practice shows that all States condemn terrorism and the financing of terrorism, but that

[122] See e.g. the declaration of Qatar of 3 October 2001, above para. 19.

consensus is at a very high level of generality;

(2) there is no generally accepted definition of terrorism in international law;

(3) a substantial number of Arab, Islamic and African States continues to exclude groups fighting foreign occupation or alien domination, and especially Palestinians groups "fighting for self-determination and national liberation", from the definition of terrorists;

(4) there is no evidence of an established, widespread and consistent practice on the part of States coupled with the necessary *opinio juris* that financing of terrorism is prohibited by customary international law and entails the direct criminal responsibility under international law; and

(5) financing of terrorism does not have a clear and defined content under customary international law and is therefore insufficiently precise to support individual criminal responsibility.

Respectfully submitted

Stefan Talmon

University Lecturer in Public International Law, Oxford University Fellow of St. Anne's College, Oxford

July 18, 2005

I declare, under penalty of perjury and the laws of the United States of America, to the best of my

knowledge and belief, that the statements made in this Declaration are true and correct.

Executed on July 18, 2005, at St. Anne's College Oxford, United Kingdom.

/s/ Stefan Talmon
Stefan Talmon

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case Number: 04-CV-5564

ORAN ALMOG, et al.,

Plaintiffs,

v.

ARAB BANK, PLC,

Defendant.

SECOND DECLARATION OF ERIC A. POSNER

I, Eric A. Posner, declare as follows:

Introduction

1. I have been asked by counsel for the defendant to provide my opinion on the three declarations submitted by experts for the plaintiffs in response to my declaration of April 12, 2005 ("Posner Decl.").

General Considerations

2. The violent attacks described in the Complaints are abhorrent, and the loss of life has been tragic. Such tragedy does not, however, give rise to a cause of action based on international law. The Supreme Court has recently made clear that the Alien Tort Statute incorporates international law in a limited fashion. *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739 (2004). As I explained in my earlier declaration, the acts described in the Complaints attributed to the defendant do not

constitute international crimes recognized by customary international law under the *Sosa* standard.

3. The three declarations submitted by experts for the plaintiffs share three general flaws. First, they attempt to describe general norms of international law without applying, or taking into account, the heightened standard of *Sosa*. Second, they rely heavily on sources of international law about which the *Sosa* Court expressed skepticism. Third, they largely disregard state practice – one of the two essential conditions for the existence of customary international law (the other being consent to be bound, or *opinio juris),* as *Sosa* emphasized.

Failure to Apply the Sosa *Standard*

4. The *Sosa* Court made clear that the Alien Tort Statute does not incorporate all norms of international law, only those that have the degree of specificity and adherence of the "law of nations" that existed in 1789, when the Alien Tort Statute was enacted. "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized," *Sosa,* 124 S. Ct. at 2761-62 – namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 2761. Norms of international law that may be the basis of an Alien Tort Statute claim are therefore a subset of the entire universe of international legal norms.

5. Professor Dinstein's declaration does not cite *Sosa,* and he seems to be unaware of Sosa's heightened standard for recognizing norms of international law. In discussing international law, he thus does not

distinguish between norms that are arguably a part of international law from the international lawyer's perspective, and norms that are sufficiently widespread and definite to pass the *Sosa* test. Professor Drumbl's declaration does cite *Sosa* (Drumbl Decl., ¶ 7) but ignores the *Sosa* Court's admonishment that only widespread and definite international law norms suffice for Alien Tort Statute purposes; he neglects to distinguish, among the norms he discusses, those that are widespread and definite and those that are not. Professor Wedgwood also cites *Sosa*'s standard in an early paragraph (Wedgwood Decl., ¶ 6), but in her analysis of the law later in her declaration she almost never tries to show that a putative norm of international law is not only a norm of international law, but a norm that is as definite and widespread as the eighteenth century laws governing piracy, safe conducts, and ambassadors. Thus, even if the descriptions of international law in the three declarations are correct, none of the declarations shows that any of the norms they discuss meet *Sosa*'s standard.

Reliance on Weak Sources of Customary International Law

6. The *Sosa* Court was critical of the practice of finding evidence of a widespread and definite norm of international law in documents that show that states may have hortatory, political, or moral concerns but do not provide evidence that they acknowledge a legal obligation. Thus, the Court rejected attempts to derive customary international law norms from the Universal Declaration of Human Rights, which is nonbinding; the International Covenant on Civil and Political Rights, which is not self-executing and thus not incorporated in United States law; various

conventions of which the United States is not a party; a survey of national constitutions, which, the Court notes, shows a consensus about the norm in question only at a high level of generality; and an opinion of the International Court of Justice, which contains only a passing reference to the norm *Sosa*, 124 S. Ct. at 2767-68 & n.27.

7. Yet the authors of the declarations rely on materials with similar defects. They heavily rely on Security Council Resolutions even though these resolutions, as Professor Wedgwood acknowledges (Wedgwood Decl. at p. 20 n.40), are based on the UN Charter, which is a non-self-executing treaty. They rely on the charters of the Yugoslavia and Rwanda tribunals (*e.g.*, *id.* at ¶ 46), which are creations of the Security Council and thus derive their authority from the non-self-executing UN Charter. They rely on the Rome Statute for the International Criminal Court, which was repudiated by the United States in the most explicit way possible,[1] and has not been ratified by

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[1] The U.S. signed the treaty, but then subsequently "unsigned" it and failed to ratify it. Congress also passed a statute that banned cooperation with the International Criminal Court. American Service Members Protection Act of 2002, 22 U.S.C. § 7401. One might argue that the U.S. rejected the Rome Statute not because it disagreed with the substantive provisions of that statute but because it feared political prosecutions of Americans. However, during negotiations the U.S. sought something broader than immunity for Americans it sought a treaty in which ICC prosecutions would be conditional on a Security Council referral, on which the U.S. holds a veto. UN Doc. A/C.6/53/SR.9, at ¶ 55 (statement of Ambassador David Scheffer). This would have made the application of the substantive provisions of the Rome Statute depend on a prior evaluation by the Security Council of the gravity of the alleged crimes in any given case. Such a system would likely have led the jurisprudence of the Rome Statute in a different direction from that of the system that came into

eight of the ten most populous nations in the world, representing more than 3 billion people.[2] Although standard practice in international law scholarship allows one to use sources such as these as "evidence" of customary international law, and *Sosa* does not explicitly reject this practice, it clearly warns against relying on this kind of evidence too much. Putting aside these sources, the bases for the plaintiffs' experts' declarations are thin indeed.

8. The plaintiffs' experts also rely heavily on a small number of decisions of the Yugoslavia and Rwanda tribunals. The problem with reliance on these decisions is that the decisions of these tribunals do not, by themselves, make law binding on all states; these decisions can become law only if states, in word and deed, demonstrate that they accept them. States do have a legal obligation to "cooperate" with these tribunals *(e.g.*, Statute of the International Criminal Tribunal for the Fonner Yugoslavia, art. 29), but this is interpreted to mean assisting in the apprehension and extradition of defendants, in the assembly of evidence, and in similar procedural or logistical matters; it does not include an obligation to accept the tribunals' interpretations of international law. If states do not accept the tribunals' interpretations of international criminal law, their decisions do not

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existence, which can be invoked much more easily. The U.S. and other countries that rejected the Rome Statute might well have feared losing control over the development of international criminal law. Note also that China objected to substantive provisions of the Rome Statute, including provisions on crimes against humanity relevant to the case at hand. *Id.* at ¶¶ 36-37 (statement of Ambassador Qu Wensheng).

[2] China, India, the U.S., Indonesia, Pakistan, Russia, Bangladesh, and Japan. Russia and Bangladesh have signed but not ratified the treaty.

become a part of customary international law. Although plaintiffs' experts suggest that the decisions of international tribunals may provide evidence of customary international law, this type of evidence must be approached cautiously. For example, there is some indication that states are not happy with some of the decisions of these tribunals,[3] but in any event we will not know whether states are willing to accept these decisions as correct descriptions of customary international law until they are tested by state practice – such as states agreeing that their own citizens have committed crimes as defined by these tribunals, or refraining from engaging in the particular types of behavior condemned by these tribunals.

Failure to Discuss State Practice

9. The *Sosa* Court acknowledged that the "state practice" requirement for customary international law is alive and well. The Court said that "[i]t is not that violations of a rule logically foreclose the existence of that rule as international law . . . . Nevertheless, that a rule as stated is as far from full realization as the one [asserted in the *Sosa* case] is evidence against its status as binding law . . . ." *Sosa*, 124 S. Ct. at 2769

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[3] Indeed, it may be that the Rome Statute for the International Criminal Court cut back on the Yugoslavia Tribunal's jurisprudence: "In the future, judges [of the ICC] will have greater difficulty undertaking the kind of judicial lawmaking that the *ad hoc* Tribunal for Yugoslavia performed in the *Tadic* case, and this will make it harder for justice to keep up with the imagination and inventiveness of war criminals. Indeed, the *Tadic* Appeals Chamber may well have frightened States with its bold judicial lawmaking, who then resolved that they would leave far less room for such developments in any statute of an international criminal court." William A. Schabas, An Introduction to the International Criminal Court 42 (2001).

n.29. To take one of *Sosa*'s examples, not only did all civilized states in the late eighteenth century condemn piracy, declare that piracy violates the law of nations, recognize the crime of piracy in legal instruments, and so forth; they also instructed their navies to capture and punish pirates, and their navies did so. And the execution of the law was not limited to one or two great powers; it was shared by all civilized states. For there to be a norm of customary international law, it must be the case not only that all or virtually all civilized states express consent to the norm; it must also be the case that they act consistently with the norm.

10. It is for this reason that in my earlier declaration, I discussed historical examples of activities similar to those alleged in the Complaints, activities whose perpetrators were not accused of, or prosecuted and punished for, committing international crimes such as genocide or crimes against humanity. Nor were banks used by the perpetrators (as far as I know) prosecuted for violating a purported international crime of terrorist financing. The declarations for the defendants do not contradict these claims. States must not only pass laws against (for example) terrorist financing; they must also investigate it, prosecute suspects, and punish them.

11. This type of confusion is illustrated by Professor Drumbl's statement that an "instant custom" came into existence because of the speed with which states ratified two treaties, the Financing Convention and the Bombing Convention: "[t]he movement toward ratifying these conventions has been so solid that both conventions can be read to represent the emergence of instant custom arising out of consistent patterns of state practice undertaken out of a firm sense of legal obligation." (Drumbl Decl., ¶

21.) Professor Drumbl confuses sense of legal obligation (or *opinio juris),* which may be proven through treaty ratifications, with state practice, which must be proven with evidence of actual activities – investigations, trials, convictions, and other forms of policy implementation. His declaration provides no such evidence.

Financing of Terrorist Operations

12. In my earlier declaration, I stated that there could be no crime of terrorist financing in customary international law because the various international instruments relied on by the Complaints do not have widespread consent, do not define terrorism or terrorist financing, or do not establish individual criminal liability. (Posner Decl., ¶ 28.) Thus, although the acts described in the Complaints are abhorrent, and are properly illegal under the domestic law of Israel, the banking services described in the Complaints cannot be considered violations of customary international law giving rise to individual criminal liability. The declarations of the plaintiffs' experts do not refute my conclusion.

13. The focus of the declarations is Resolution 1373. All three experts claim that Resolution 1373 creates an international crime of terrorist financing.[4] It does no such thing.

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[4] Professor Dinstein does not actually say that terrorism financing is an international crime in his main discussion of it (Dinstein Decl., pp. 1-3), but he does make this claim, in conclusory fashion, at the end of his declaration (Dinstein Decl., p. 6). The conclusion of the main discussion is that the U.S. and all other states "are obligated to fight the financing of terrorism" (Dinstein Decl., p. 3) as a consequence of Resolution 1373 and the Convention for the Suppression of the Financing of Terrorism. This is a correct statement of international law, but nothing

14. Professor Wedgwood correctly observes that Resolution 1373 "creates direct international legal obligations for Jordan, the United States, and all other states . . . ," but then she incorrectly continues that the Resolution "implies correlative legal duties for private parties." (Wedgwood Decl., ¶ 68.) This statement of international law is false: it is uncontroversial that treaties and Security Council resolutions that create obligations for *states* do not necessarily create obligations for *individuals*. Treaties and resolutions create obligations for individuals only when they say as much.

15. Indeed, Professor Wedgwood partially corrects herself in the next paragraph, noting that "[u]nder international law, each state party has, in general, the right to choose how to comply with international legal obligations." (Wedgwood Decl., ¶ 69.) A state could comply with Resolution 1373 by passing domestic laws prohibiting terrorist financing, by taking military action against terrorists and their financiers, by implementing administrative procedures for tracking bank deposits, and so forth; but the state need not recognize an international crime, and until states do so, there is no such international crime.

16. Professor Wedgwood also says that a Security Council resolution becomes part of the "law of nations." (Wedgwood Decl., ¶ 69.) Again, Resolution 1373 creates international obligations for states; it does not by its terms purport to create an international

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follows from it that is relevant to the claims made by the plaintiffs, for the reasons discussed in ¶¶ 14-20.

crime; it instead decides that states shall take certain actions described above.[5]

17. Professor Wedgwood also notes that the Convention on the Financing of Terrorism requires that states ensure that persons and entities located on their territories "be held liable" when they engage in certain actions. (Wedgwood Decl., ¶ 74.) However, this provision directs states to pass domestic criminal laws, not to recognize the existence of international crimes.

18. The important point here is that even when treaties or Security Council resolutions direct states to create *domestic* criminal law, one cannot infer that they are thereby creating an *international* crime. When Resolution 1373, ¶ 1(b), directs states to "[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used in order to carry out terrorist acts," this order does not, by its terms, create an

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[5] Professor Wedgwood also cites Security Council Resolution 1566. (Wedgwood Decl., ¶¶ 81, 92-99.) This Resolution, however, does not create or recognize new international criminal law, and indeed acknowledges the absence of consensus about the definition of terrorism. The Security Council called upon:

> 4 . . . all States to become party, as a matter of urgency, to the relevant international conventions and protocols whether or not they are a party to regional conventions on the matter;
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> 5 . . . . Member States *to cooperate fully on an expedited basis in resolving all outstanding issues with a view to adopting by consensus* the draft comprehensive convention on international terrorism . . . .

S.C Res. 1566, U.N. Doc. *S/1566* (2004) (emphasis added).

international crime. It merely orders states to pass domestic legislation.[6] If a state fails to pass such legislation, it violates international law, and it may be sanctioned by the Security Council, but it does not follow that individuals who engage in the acts that states were directed to criminalize by Resolution 1373 commit an international crime.

19. Further, even if states do pass domestic legislation, it does not follow that individuals who violate the law also commit an international crime. They commit a domestic crime, but a domestic crime is not an international crime even when all states have the same law. For example, a treaty that directed states to pass domestic laws that make price-fixing a crime does not necessarily create an international crime of price-fixing. For an international crime to exist, states must agree that an international crime exists. Common domestic law, and a treaty instrument that directs states to harmonize their domestic law, may be evidence of *opinio juris* in this respect; but they are not sufficient to establish the existence of an international crime.[7]

20. The absence of an international crime of terrorist financing explains why Resolution 1373, ¶ 3(d) calls upon states to "[b]ecome parties as soon as

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[6] As noted above (¶ 7), the UN Charter is a non-self-executing treaty; thus, Security Council resolutions cannot automatically become American domestic law.

[7] There are various legal consequences that follow from classifying an act as an "international crime" as opposed to a domestic crime that happens to be identical in every state. For example, courts are more likely to claim jurisdiction over an international crime that is committed on foreign territory by a foreign national than over a domestic crime that is committed on foreign territory by a foreign national.

possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999." If Resolution 1373 itself had been intended as an act of legislation that created new international crimes by fiat, then it would have served no purpose for the Resolution to call upon states to ratify treaties that provided for those same international crimes. The Security Council appeared to believe that treaty ratification was necessary and proper for creating new law to fill the existing legal vacuum – in particular, the absence of a widely accepted and specific definition of terrorism and terrorist financing.

21. Professor Wedgwood notes that a High-Level Panel on Threats, Challenges, and Change observed in a 2004 report that: "virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statute. Legal scholars know this." (Wedgwood Decl., ¶ 85, quoting High-Level Panel Report on Threats, Challenges, and Change, UN Doc. A/59/565, at ¶ 159 (2004).)

22. If international law already clearly and adequately handles terrorism, why does the High-Level Panel recommend a "comprehensive treaty"? As Professor Wedgwood notes, the High-Level Panel itself says that there are "political" reasons for such a treaty. (Wedgwood Decl., ¶ 86.) But there are legal reasons as well, namely, that there are gaps and ambiguities in current law. Although the treaties and conventions cited by the High-Level Panel ban many forms of terrorism, not all states have ratified all these treaties

and conventions, and many of those that have did so subject to reservations *(see* Posner Decl., ¶¶ 16-26).[8]

23. Professor Drumbl says that the High-Level Panel "was able to consolidate consensus on a definition of terrorism that specifically referenced it as a crime under international law." (Drumbl Decl., ¶ 26.) This statement is misleading in two respects. First, the "consensus" that Professor Drumbl refers to is a consensus among the members of the High-Level Panel, who have no power to make law; not a consensus among states, which is necessary for the creation of customary international law.

24. Second, the High-Level Panel offers only what it calls "elements" of a definition (High-Level Panel Report, ¶ 164) that, it says, should guide states as they negotiate a treaty. In its own words:

> Nevertheless, we believe there is particular value in achieving a consensus definition within the General Assembly, given its unique legitimacy in normative terms, and that it should rapidly complete negotiations on a comprehensive convention on terrorism.[9]

25. The High-Level Panel is recommending reform, not stating existing law. Or as United Nations Secretary-General Kofi Annan puts it, in summarizing

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[8] The High-Level Panel acknowledges these ambiguities and gaps, and, although it calls them "political," it is clear that the disagreements it acknowledges would undermine the claim that there is a specific and widespread norm of customary international law. *See* High-Level Panel Report, ¶ 157 ("The United Nation's ability to develop a comprehensive strategy has been constrained by the inability of member states to agree on an anti-terrorism convention including a definition of terrorism.").

[9] *Id.* at 163.

the Panel's report: "[o]ne of the obstacles hitherto, I believe, has been the inability of the membership [of the United Nations] to agree on a definition of terrorism. The report offers a definition and I am confident that this will help in building the consensus we need in order to move forward quickly."[10] However, a treaty instrument that does incorporate such a definition has not been adopted. Secretary-General Annan observed again, just three months ago, that lack of agreement on a definition of terrorism continues to threaten global security (Posner Decl., ¶ 27). His views were echoed a few weeks ago by former Secretary of State Madeleine Albright and five former foreign ministers of other countries.[11] These views were also expressed recently by the United Nations committee charged with developing a comprehensive counterterrorism treaty.[12]

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[10] Note by the Secretary-General, High-Level Panel Report, *supra*, ¶ 11.

[11] *See* Madeleine Albright, *et al.*, A New U.N., The Wall Street Journal, July 8, 2005, p. A10 ("Furthermore, the U.N. member states should seize this opportunity to define terrorism by accepting the U.N. secretary general's definition. The failure to develop such an agreed definition in the past has complicated international diplomacy and slowed global counterterrorism efforts.").

[12] This committee reported in 2004 that member states continue to disagree about the definition of terrorism, and the report made clear that the lack of such a definition continues to be a stumbling block. "Several delegations stressed the importance of arriving at a clear and universally agreed definition of terrorism." Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Eighth session (28 June - 2 July 2004), A/59/37, at ¶ 15, available at http://daccessdds.un.org.doc/UNDOC/GEN/N04/415173/PDF\NO441573.pdf/OpenElement. The committee noted that "[s]ome delegations reiterated the view that the

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26. Professor Dinstein places great weight on the views of Judge Gilbert Guillaume, a judge and former president of the International Court of Justice. He notes that Judge Guillaume said that in adopting Resolution 1373, the Security Council "assumed the role of a true international legislator." (Dinstein Decl., p. 2, quoting Guillaume at p. 543.[13]) He then quotes Judge Guillaume at length for a definition of terrorism. (Dinstein Decl., pp. 2-3, quoting Guillaume, *supra,* at 540-41.) This gives the impression that Judge Guillaume believes that there is a clear definition of terrorism in international law. However, the next sentence in Judge Guillaume's article – a sentence that Professor Dinstein does not quote is this: "However, the international community has not yet been able to reach an agreement on such a definition of terrorism." (Guillaume, *supra,* at p. 541.)

27. As is clear from the context of the quotation, Judge Guillaume offers his definition of terrorism as a proposal for *reform* of international criminal law, after lamenting the absence of a definition of terrorism in

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comprehensive convention should contain a definition of terrorism clearly distinguishing it from the legitimate struggle of peoples against foreign occupation." (*Id.*) "[A] key outstanding issue" was article 18 of the draft convention. (*Id.* at ¶ 19.) One version of article 18, which was proposed by member states of the Organization of the Islamic Conference, excludes "situations of foreign occupation" from the Convention; the other version does not contain this exclusion. (For the text of the competing provisions, *see* Annex 4 of the Report of the Ad Hoc Committee, Sixth Session (28 January 1 - February 2002), A/57/37), available at http://daccessdds.un.orgldoc/UNDOC/GEN/N02/248/17/PDF/N0224817.pdf?OpenElement.) Thus, UN member states continue to disagree about the appropriate definition of terrorism.

[13] Gilbert Guillaume, Terrorism and International Law, 53 Int'l & Comp. L.Q. 537 (2004).

international law. His views are worth quoting at length:

> For decades the authors of these instruments for the prevention and suppression of offences including certain acts of terrorism have . . . refrained from using or defining the term "terrorism" itself. They have preferred to focus on the prosecution and extradition of perpetrators of certain designated acts such as the hijacking of aircraft, acts of violence against aircraft, airports, ships and oil platforms, attacks on diplomats or hostage-taking. This prudence indeed explains the success of the various conventions thus concluded . . . .
>
> The discussions that took place at the time, in both Strasbourg and New York, illustrated the difficulty of finding a unanimously accepted definition of terrorism. The Ad Hoc Committee on International Terrorism set up by the United Nations General Assembly attempted to achieve this between 1972 and 1979. But it was unable to succeed because, during the debates, the members of the Group of 77 repeatedly emphasized the legitimacy of actions by national liberation movements and demanded that such actions should in no way be confused with terrorism. It appeared then and later that, quite often, according to a commonplace of our times, "one person's terrorist is another person's freedom fighter."[14]

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[14] *Id.* at 538-39 (footnotes omitted).

28. Judge Guillaume continues to discuss the history of frustrated efforts to define "terrorism":

> Twenty years later [in 1997] a convention was drawn up by the United Nations for the suppression of terrorist bombings, but came no closer to defining "terrorism." It was only in 1999 that a convention signed in New York for the suppression of the financing of terrorism made a first attempt at a definition, the result being unhappily inconclusive. It was somewhat paradoxical – at least at first glance – that the international community was seeking to suppress terrorism but could not really pinpoint its meaning.
>
> The 11 September events did not herald any change of direction in this respect. The Security Council, in its Resolution 1368 of 12 September 2001, called on the international community to "redouble their efforts to prevent and suppress terrorist acts." Later on, in Resolution 1373 of 28 September 2001, the Council decided upon a certain number of appropriate measures to be taken by States. However, the Council failed to provide any clarification as to what it meant by "terrorism." Moreover, India presented a proposal to the United Nations General Assembly for a comprehensive convention against international terrorism, which has been unsuccessful due to the failure to agree on the scope of the Convention, that is to say, once again, on a definition of terrorism. The same difficulties were encountered in the preparation of a draft convention on the suppression of acts of nuclear terrorism. It was

> only in the context of the European Union that an attempt was made to lay down such a definition, although with somewhat complex and uncertain wording, in a 2002 Framework Decision on combating terrorism.
>
> To combat terrorism without defining it remained possible for as long as the word itself was not uttered. However, to make use of the term as we do today, often without determining its true scope, does carry certain drawbacks. It tends to give rise to uncertainty and leaves States the possibility of making unilateral interpretations geared towards their own interests, particularly with respect to Security Council Resolutions. It would thus be helpful to attempt to provide such a definition, taking as a basis the few texts that have endeavoured to do so.[15]

29. At this point, Judge Guillaume offers a definition, and it is his discussion of his own hypothetical definition that Professor Dinstein quotes. But Judge Guillaume does not assert or imply that his definition is accepted as international law – quite the opposite, he offers it to fill a gap in international law. In this respect, Professor Dinstein's use of Judge Guillaume's words to suggest that there is such a definition in international law is misleading.

30. Professor Dinstein also quotes from an article written by international law scholar Eric Rosand. (Dinstein Decl., p. 2) According to Rosand, Resolution 1373 goes "beyond the existing international counterterrorism conventions and protocols binding only those that have become parties

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[15] *Id.* at 539-40.

to them. This is an unprecedented step for the Security Council to take. The Council has taken provisions from a variety of international legal instruments that do not yet have universal support, such as the Terrorism Financing Convention, and incorporated them into a resolution that is binding on all UN member states."[16]

31. Professor Dinstein takes this quotation out of context in such a way as to create the misleading impression that Rosand believes that terrorism is a crime under international law. In fact, Rosand says the opposite. Here is what he says:

> Since the fall of 2000, this group [a committee established by the General Assembly] has continued its efforts to conclude a Comprehensive Convention on International Terrorism. Negotiators are grappling with the difficult issue of defining terrorism. Some states still want their friends to be able to use terrorism to advance their favorite causes. The oft-repeated phrase, "one's man [sic] terrorist is another man's freedom fighter," unfortunately remains relevant.
>
> Resolution 1373 does not attempt to define terrorism.[17]

32. Rosand then explains that Resolution 1373 requires states to "take steps to combat terrorism":[18] this includes updating laws, improving border security, exchanging information with other

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[16] Eric Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 Am. J. Int'l. L. 333, 334 (2003) (footnote omitted).

[17] *Id.* at 334 (footnotes omitted).

[18] *Id.*

states, providing judicial assistance, and so forth. That is to say, Resolution 1373 does not create a new international crime of terrorism, one that individuals are liable for violating; it creates new obligations for states, requiring them to cooperate with other states.

33. Rosand notes that one of the challenges to further progress is:

> the absence of an agreed definition of terrorism among UN member states. One of the reasons the CTC [a Security Council committee] has maintained such broad support from member states is that it has been able to avoid dealing with the divisive issue of the definition of "terrorism." Resolution 1373 does not include a single definition; rather, it allows each member state to define terrorism under its domestic system . . . . The Council has left the discussion of a single definition to the General Assembly, in particular the Sixth (Legal) Committee, which is currently engaged in negotiations on a Comprehensive Convention on International Terrorism. As noted above, these negotiations are stalled precisely as a result of an inability to reach a consensus on this issue.[19]

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[19] *Id.* at 339-40 (footnote omitted). Professor Dinstein cites yet another article for the proposition that Resolution 1373 was "one of the most important resolutions in [the] history [of the Council]." (Dinstein Decl., p. 2, quoting Stefan Talmon, The Security Council as World Legislature, 99 Am. J. Int'l. L. 175, 177 (2005).) Yet Talmon expresses grave doubts about the Security Council's ability to legislate, and, specifically, notes "the international community still has not arrived at a consensus on the definition of terrorism," and that Resolution 1373 does not define "terrorist acts," so that Syria has been able to claim that it

The CTC itself does not think that state implementation of Resolution 1373 has been satisfactory.[20]

34. Professor Drumbl's analysis adds nothing to what Professors Wedgwood and Dinstein say (Drumbl Decl., ¶ 15), other than the assertion that the "speed and scale of ratifications of the Financing Convention and the Bombing Convention are startling." (Drumbl Decl., ¶ 21.) Professor Drumbl interprets the speed of ratification as evidence that the crimes described in those conventions have entered customary international law. But the fact remains that states have the right to ratify or refuse to ratify treaties, and that the definition of "terrorism" in the Financing Convention is, in the words of Judge Guillaume, "unhappily inconclusive." *(See supra* ¶ 28.) The numerous states that have refused to ratify these

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complies with the resolution even though it supports legitimate struggle against foreign occupation. *Id.* at 189. He also notes how states have exploited the ambiguity of the term, "financing of terrorist acts." *Id.* And he notes a "certain compliance fatigue . . . among the UN member states." *Id.* at 191. This last point contradicts Professor Dinstein's claim that the CTC's operations are evidence of the success of Resolution 1373. (Dinstein Decl., p. 1.) Finally, Talman also notes that Resolution 1373 does not provide a definition of the term, "funds," as used in ¶ 1(b) of the Resolution. Talmon, *supra*, at 189.

[20] The CTC's January 2004 report concludes: "From all the above issues it is clear that the implementation of Resolution 1373 is encountering serious problems, both at the States and at the Counter Terrorism Committee levels." *See* Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001), S/2004/70 (January 26, 2004), at p. 15; available at http://daccessdds.un.org/doc/UNDOC/GEN/N04/219/97/PDF/N0421997.pdf?lOpenElement.

treaties, or have done so only subject to reservations, cannot be ignored.

35. In sum, there is no customary international law norm, and certainly not a definite and widely accepted norm, recognizing individual criminal responsibility for terrorist financing of the type alleged in the Complaints.

Complicity in, or Aiding and Abetting, Genocide

36. In my earlier declaration, I concluded that there is not a definite and widespread norm of customary international law that the provision of banking services described in the Complaints constitutes complicity in genocide or aiding and abetting genocide. (Posner decl., ¶ 37.) Nothing in the declarations of the plaintiffs' experts refutes this conclusion.

37. There are two sources of ambiguity: one concerns the contours of the norm against genocide; the other concerns the meaning of complicity and aider and abettor liability.

38. As to the first problem, I pointed out in my earlier declaration that a "broad definition of genocide that encompassed the use of violence for purposes of national liberation would sweep in numerous national resistance movements, including Jewish resistance to British occupation of Palestine, local resistance to French colonial rule in Algeria and Vietnam, the struggle against Apartheid in South Africa, and the Irish Republican Army's resistance to British control of Northern Ireland" (Posner Decl., ¶ 34); yet the international community never declared that the attacks against civilians in these cases constitute genocide. Killing civilians is abhorrent

behavior in any context, but it is not always a violation of international law.

39. None of the plaintiffs' experts attempts to refute this point. Instead, the plaintiffs' experts provide some general comments about the legal definition of genocide. In doing so, they inadvertently emphasize the ambiguous contours of the crime.

40. For example, Professor Wedgwood says genocide can occur as a result of "[m]urdering or inflicting serious bodily harm on a 'substantial' part of an ethnic group" (Wedgwood Decl., ¶ 49); so does Professor Dinstein (Dinstein Decl., p. 5.) Neither expert says how much "substantial" is. Professor Drumbl says that "small numbers of victims can, if murdered as part of a plan to wipe out an entire group in whole or in part, meet the requisite standards of genocide." (Drumbl Decl., ¶ 32.) Professor Drumbl does not explain how large a part is sufficient for a genocide.[21]

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[21] In *Krstic,* the Yugoslavia Tribunal offered what it called "useful guidelines," for example:

> The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualities as substantial within the meaning of Article 4.

41. In this connection, recall the *Sosa* Court's observation that "violations of a rule [do not] logically foreclose the existence of that rule as international law . . . . Nevertheless, that a rule is as far from full realization as the one [asserted in the Sosa case] is evidence against its status as binding law . . . ." *Sosa*, 124 S. Ct. at 2769 n.29. States do not treat brief arbitrary detentions as international crimes; nor do they generally treat internal violence motivated by the goal of national liberation, even when tinged by racial or ethnic animus, as tantamount to the international crime of genocide. Again, *Sosa*: "although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses." *Id.* at 2769. Similarly, although it is easy to say that certain racially, ethnically, or religiously motivated killings are so bad that those who commit them become enemies of the human race, it is harder to say when they cross the line between purely domestic crime and international crime. Although there is a core meaning of genocide that is specific and has the adherence of virtually every state, the periphery of

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Prosecutor v. *Krstic*, IT-98-33-A, Appeals Chamber (April 19, 2004), ¶¶ 12-14. In light of these vague guidelines, and the uncertain status of the Yugoslavia Tribunal's jurisprudence, there remains considerable uncertainty about the contours of the norm of genocide. *See* James Meernik, Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda, 4 Int'l Crim. L. Rev. 65, 80 (2004) ("the ICTR has significant practical and legal challenges ahead . . . . First, the Appeals Chamber for the ICTY and the ICTR should arrive at an appropriate definition of a protected group under the meaning of the Genocide Convention, an issue where there has been a great deal of debate.").

that norm is ambiguous. The allegations of the Complaints, in my view, fall outside the core.

42. As for complicity in genocide, I stated in my earlier declaration that "the [Genocide] Convention does not define 'complicity,' nor does any authoritative source, as far as I know. It might be that ordinary criminal law notions of complicity were supposed to be incorporated, but, if so, substantial evidence of subsequent *opinio juris* and state practice does not exist. Thus, there is no international consensus that acts like providing banking services of the type alleged in the Complaints, to people who are purported to be engaging in genocidal acts, should be considered complicity in genocide." (Posner Decl., ¶ 32.)

43. The plaintiffs' experts respond to this conclusion with various conclusory assertions or by repeating the boilerplate definitions of complicity that can be found in international documents. Professor Dinstein, for example, concludes that "those who facilitate payments to [terrorists'] families, as inducement, are guilty of complicity in the crime [of genocide]" (Dinstein Decl., p. 5), yet his declaration does not discuss the international law of complicity in genocide. Professor Dinstein does not show, or even claim, that the elements of complicity in genocide are reflected in definite and widespread norms of international law. (Dinstein Decl., pp. 3-5.)

44. Professor Wedgwood cites four cases decided by the Yugoslavia Tribunal (Wedgwood Decl., ¶¶ 58-61), apparently in order to show that there is a specific norm of aiding and abetting; however, none of these cases involved aiding and abetting genocide.

45. Professor Wedgwood notes that a court has held that "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed." (Wedgwood Decl., ¶ 61, quoting *Prosecutor* v. *Furundzija,* Case No. IT -95-1711, Trial Chamber (December 10, 1998), ¶ 246.) But what is necessary? Professor Wedgwood does not show, or even claim, that these norms are specific and widespread enough to satisfy the Sosa standard. It is doubtful that one can separate the concept of aiding and abetting from the underlying crime, so the fact that aiding and abetting may be clear for some crimes (as it might have been for piracy in the eighteenth century) does not mean that it is clear for all crimes.

46. Professor Drumbl says that "[i]t is indisputable that the law of nations recognizes complicity, conspiracy, and joint criminal enterprise as theories of liability for individual responsibility [or genocide, crimes against humanity, and war crimes. Contrary to the position taken in the declaration *(e.g.*, [Posner Decl.,] ¶ 32), these bases of liability are clearly defined by authoritative sources in the law of nations." (Drumbl Decl., ¶ 33.)

47. But the sources cited by Professor Drumbl are not authoritative under the *Sosa* standard. Aside from citing the Rome Statute and Tribunal charters whose criminal liability provisions do not bind the United States *(see supra* ¶ 7), Professor Drumbl cites two cases decided by the Rwanda Tribunal. *(See* Drumbl Decl., ¶ 34.) For reasons provided in ¶ 8, above, it is questionable that the Rwanda Tribunal's decisions are a strong source for customary international law, but in any event the two

cases cited by Professor Drumbl do not shed any light on the norm of complicity in genocide.

48. In *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14, Trial Chamber (May 16, 2003), Appeals Chamber (July 9, 2004), the defendant, who both led large scale armed attacks against Tutsi refugees and personally shot at many of them, was found guilty of genocide and other crimes against humanity, and guilty of conspiracy to commit genocide, but he was found *not guilty* of complicity in genocide (*id.*, Trial Chamber, ¶ 421).

49. In *Prosecutor* v. *Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Trial Chamber (December 3, 2003), the three defendants, who used newspapers and radio to incite genocidal attacks against the Tutsis, were found guilty of genocide and other crimes against humanity, and guilty of conspiracy to commit genocide, but all three were found *not guilty* of complicity in genocide (*id.* at ¶ 1056).

50. I do not understand what Professor Drumbl means to establish by citing these two cases. Since they do not involve a finding of complicity in genocide, or discuss complicity in genocide in any detail, they do not shed light on the norm of complicity in genocide.[22]

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[22] The *Krsti*□ case is somewhat more helpful for shedding light on the norm of aiding and abetting genocide. *See Krsti*□, *supra*. That case involved a commander who supplied military resources to others who were committing genocide, while knowing that they were doing so; he was found guilty of aiding and abetting genocide. But this case left many issues unanswered – how much of a contribution is necessary, and how direct must it be – and cannot be sufficient to establish a widespread and definite norm under the *Sosa* standard, and certainly not one

51. Neither these cases nor any other sources cited by the plaintiffs' experts clarify the meaning of complicity in genocide, or aiding and abetting genocide, to the extent that one could conclude that there is a definite and widespread norm of customary international law that specific acts such as the provision of banking services described in the Complaints constitute complicity in, or aiding and abetting, genocide.

Facilitating Payments to Families of Suicide Bombers

52. In my earlier declaration, I concluded that a bank, by allegedly transferring funds after the fact to the families of suicide bombers with the purported intent to provide an incentive for suicide bombing, would not violate a specific and widespread customary international law norm against aiding or abetting crimes against humanity (Posner Decl., ¶ 51). My conclusion was based on the weakness of the authorities, and the many historical examples of national liberation movements and domestic terrorist groups whose attacks on civilians, horrible as they have been, have not been condemned as crimes against humanity by the international community.

53. In arguing that crimes against humanity – in particular, mass killings that fall short of genocide – have entered customary international law, Professor Wedgwood notes that the U.S. participated in the

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broad enough to encompass the provision of banking services of the type alleged in the Complaints. Similar cases are few. And it has been suggested that the Yugoslavia and Rwanda tribunals hold inconsistent views about the meaning of "aiding and abetting." *See* Alex Obote-Odora, Complicity in Genocide as Understood Through the ICTR Experience, 22 Int'l Crim. L. Rev. 375, 391 (2002). Thus, there is no consensus to be drawn from these tribunals' judgments.

negotiation of the Rome Statute (Wedgwood Decl., ¶ 45), and Professor Drumbl also believes that the repudiation of the Rome Statute by the U.S. and many other countries should be ignored (Drumbl Decl., ¶ 29). But the fact remains that the U.S. and many other major states rejected the Rome Statute. The ICC's statute is, at best, a highly limited source for customary international law on crimes against humanity.

54. The main source of ambiguity is the requirement that acts such as murder must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." (*E.g.*, Rome Statute of the International Criminal Court, art. 7(1).)

55. Professor Wedgwood does not attempt to shed light on this requirement (Wedgwood Decl. ¶¶ 42-45).

56. Professor Dinstein says that the "common denominator of all the definitions [of crime against humanity] is that crimes against humanity includes killing (usually in wartime) directed against 'any civilian population.'" (Dinstein Decl., p. 5.) Professor Dinstein also cites the *Nikolic* case for the proposition that "the crimes, considered as a whole, must be of a certain scale and gravity." (Dinstein Decl., p. 5, citing *Prosecutor* v. *Nikolic*, 108 Int'l Law Rep. 21, 33 (1995).) Neither the *Nikolic* case nor any other case cited by the experts discusses the scale and degree of gravity at which "ordinary" murders, governed by domestic law only, become international crimes against humanity.[23]

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[23] There are, of course, other cases that discuss crimes against humanity, but none, to my knowledge, that establish

57, Professor Drumbl asserts that "[c]ustomary international law quite precisely defines 'widespread' as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It defines 'systematic' as thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources." (Drumbl Decl., p. 8 n.6.) Although Professor Drumbl does not provide a citation, this language has been used in some of the cases decided by the Rwanda tribunal (*e.g.*, *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4, Trial Chamber (September 2, 1998), ¶ 580). The definitions are not precise,[24] but in any event these sources are questionable under the *Sosa* standard (*see supra* ¶ 7).

58. There remains the question of complicity or aiding and abetting. The Complaints argue that the defendant aided and abetted crimes against humanity by allegedly transferring funds after the fact to the families of suicide bombers with the purported intent to provide an incentive for suicide bombing. The plaintiffs' experts do not cite any cases or authorities that suggest the norms of aiding and abetting crimes against humanity encompass such behavior, and that such norms, if they exist, are definite and widespread enough to pass the *Sosa* standard.

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specific and widespread norms that govern the type of behavior described in the Complaints, and none cited by plaintiffs' experts.

[24] *See also* Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 126 (Otto Triffterer ed. 1999) ("It is difficult to concretely outline exactly which factual scenarios are covered by each concept ["widespread" and "systematic"]. The adjudication will have to take place on merits of each case.").

War Crimes

59. In my earlier declaration, I did not discuss the allegation that Arab Bank had engaged in war crimes because I was not asked to do so by counsel for the defendant, and because the Complaints did not contain this allegation. I have now been asked to do so because this issue was raised for the first time in Professor Wedgwood's declaration.

60. Professor Wedgwood's declaration contains a lengthy discussion of the "rule of distinction," and apparently her argument is that the violent acts described by the Complaints violate the laws of armed conflict, and therefore are war crimes. Neither of the other plaintiffs' experts makes this argument.

61. Professor Wedgwood never explains the connection between her discussion of war crimes and the allegations against the defendant. Rather than speculate about what her argument might be, I will limit myself to some observations about her claims about the laws of war.

62. The "rule of distinction" cited by Professor Wedgwood (Wedgwood Decl., ¶¶ 25-41) is a part of a body of international law known variously as the "laws of armed conflict," "humanitarian law," and the "laws of war" (or *jus in bello*). These laws include the Geneva Conventions of 1949, the Geneva Protocols of 1977, and customary international law. They mainly regulate relations between sovereign states that are at war, and govern (for example) the treatment of prisoners of war and of civilians in occupied territory. As Professor Wedgwood notes, the laws of armed conflict include the rule of distinction, which prohibits the deliberate targeting of civilians.

63. If the rule of distinction applied everywhere, irrespective of war, then "ordinary" murder would be an international crime, as it involves the deliberate killing of a civilian. It is not. Outside of the core setting in which two sovereign states are engaged in a traditional war, the laws of armed conflict apply only to conflicts that resemble interstate war, such as civil war. They do not apply to ordinary criminal activity that takes place on the territory of a sovereign state that is at peace or not embroiled in a civil war.

64. Common Article 3 of the Geneva Conventions provides that the rule of distinction applies to internal armed conflicts, but the term, "armed conflict," has been understood to mean a full blown civil war, where an insurgency acts as an organized military force, controls territory, has a de facto government, and so forth.[25] The U.S. Civil War would be an example of the type of conflict the drafters had in mind. Common Article 3 does not contain a definition of "armed conflict," and "[t]here is, as yet, no universally accepted definition of the term . . . ."[26] A scholar who has surveyed state practice concludes:

> The difficulty is that experience has shown those provisions which the Article does contain to have been largely passed over in practice. The failure of the drafters to define the term

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[25] *See* Leslie C. Green, The Contemporary Law of Armed Conflict 56 (2nd ed. 2000) ("acts of violence committed by private individuals or groups which are regarded as acts of terrorism, brigandage, or riots which are of a purely sporadic character are outside the scope of such regulation [the laws of armed conflict] . . . .") (footnote omitted).

[26] *See* Lindsay Moir, The Law of Internal Armed Conflict 32 (2002).

> "armed conflict not of an international character" allowed states reluctant to hinder their ability to deal with an insurrection by accepting any international humanitarian obligations simply to deny the existence of armed conflict, and thus the applicability of international regulation. Article 3 therefore failed to temper the ferocity of civil war, and a more comprehensive system of humanitarian regulation was considered necessary.[27]

Because the term "armed conflict" is ambiguous, and because states have not, in practice, acknowledged that Common Article 3 applies even to major insurrections, the argument that Common Article 3 is incorporated into customary international law under the *Sosa* standard, so as to criminalize the acts described in the Complaints, is unfounded.

65. This failure of common Article 3 to influence state practice led, in part, to the negotiation of the Geneva Protocols of 1977. Article 1 of Protocol II provides that the law applies to armed conflicts:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots,

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[27] *Id.* at 88.

isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[28]

66. Protocol II has a higher threshold than Article 3, requiring, among other things, that the armed group have responsible command, control territory, carry out military operations, and have the capacity to implement the Protocol. Like common Article 3, it does not apply to internal disturbances. No aspect of the laws of war applies to internal criminal acts, even those that are committed by foreigners – such as Mafiosi, foreign drug gangs, and foreign militant organizations.

67. Further, Protocol II does not meet the *Sosa* standard. The United States has not ratified the treaty, so widespread state consent cannot be found. Further, state practice is lacking: "[t]he position as regards the observance of humanitarian law during armed conflict is most disheartening. . . . [W]hat has emerged is a pattern of States – indeed all parties – involved in hostilities being unwilling to apply either Protocol II or common Article 3. There have to date been only two internal armed conflicts where both the government and insurgents accepted the application of Additional Protocol II, namely those in El Salvador and the Philippines. It is as if the efforts of so many since the end of the Second World War to ease suffering during hostilities, and indeed to prevent such conflicts from arising, have counted for nothing."[29]

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[28] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 1.

[29] *See* Moir, *supra*, at 131 (footnote omitted).

68. Recent history provides no reason to abandon this view. The charter for the Yugoslavia Tribunal granted that tribunal jurisdiction over violations of the laws of armed conflict. The Yugoslavia conflict involved both international conflict – between, for example, Serbia (at the time known as the "Federal Republic of Yugoslavia") and Bosnia-Herzegovina, which had been recognized as an independent state in 1992 – and internal conflict – between, for example, the government of Bosnia-Herzegovina and the Bosnian Serb military forces. So, although the charter for the Yugoslavia Tribunal recognized that individuals involved in international or internal armed conflicts could be convicted for war crimes, it never recognized that individuals involved in internal disturbances – people like those described in the Complaints – could be found guilty of war crimes.[30] The same is true for the Rwanda Tribunal, which was given jurisdiction over violations of Common Article 3 and thus violations that occurred during an internal armed conflict because, at the time of the genocide,

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[30] A further wrinkle is that it is controversial whether violations of common Article 3 – that is, of the laws governing internal armed conflict are international crimes with individual liability (as opposed to simple treaty violations committed by states, in which ease individuals cannot be held criminally liable). *See* Christopher Greenwood, International Humanitarian Law and the *Tadi* Case, 7 Eur. J. Inter'l L. 265, 280-81 (1996). The ICTY held that they could be, in the *Tadi* decision (*Prosecutor v. Tadi*, Case No. IT-94-1-AR72, Appeals Chamber (October 2, 1995), at ¶¶ 128-36), but it is not clear whether this will be accepted as customary international law. Thus, even if one concluded that the attacks described in the Complaints could be classified as an "internal armed conflict" comparable to a civil war, there is no specific and widespread norm of international law creating individual criminal liability for people who deliberately target civilians.

there was also a regular civil war between the government and a Tutsi army that ultimately prevailed.

69. The distinction between an armed conflict (international or internal) and domestic disturbances including acts of violence such as those alleged in the Complaints is fundamental. States have jealously guarded their right to prosecute individuals who commit crimes on their own territory, and have refused to acknowledge that the international community has any authority over, or interest in, those crimes except when the crimes are extreme like genocide. To apply the laws of war – including the rule of distinction, which is equivalent to a prohibition on murder – to ordinary domestic crimes would be bizarre and unprecedented. For example, the laws of war would not have applied to the Weather Underground's bombings in the United States in the 1960s and 1970s. Nor would we say that Timothy McVeigh committed a war crime when he blew up a federal courthouse in Oklahoma City in 1995; or that members of the Aum Shinrikyo cult committed a war crime when they released poison gas in the Japanese subway system in 1995; or that the various attacks by the PLO against airlines in the 1970s were war crimes.[31] All of these crimes were abhorrent, but because they did not take place in the context of an armed conflict, they were not war crimes. I cannot think of any cases where governments have recognized that an organization that uses violence in order to achieve its ends (outside

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[31] *See Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974) (holding that a PLO attack on an American aircraft was not an act of war within the meaning of an insurance policy).

the context of a recognized interstate war or civil war) is subject to the laws of armed conflict.

70. Professor Drumbl says that there is a "movement to criminalize attacks against civilians undertaken by non-state actors as war crimes. Hamas and Hezbollah are precisely the kind of non-state actors, similar to al-Qaeda, that fall within this movement." (Drumbl Decl., ¶ 32.) I know of no movement to treat domestic crimes, including acts of violence such as those described in the Complaints, as war crimes. Perhaps, Professor Drumbl has in mind the unsuccessful attempts to broaden the definition of internal armed conflict. Or perhaps he is thinking of the movement to treat violations of common Article 3 and Protocol II as creating individual criminal liability, rather than (as usually understood) as merely imposing obligations on states. This movement is reflected in the granting of jurisdiction over such violations to the Yugoslavia and Rwanda Tribunals, and the granting of such jurisdiction to the International Criminal Court – but even in all these cases, the relevant acts, to be international war crimes, must be committed in the context of an "armed conflict," and we arc back to the point that violent acts outside an armed conflict are not war crimes. Further, for reasons I have given elsewhere, these international instruments are at best weak evidence of customary international law, under the *Sosa* standard. And Professor Drumbl's perception of a "movement" contradicts Professor Wedgwood's apparent claim that international law already recognizes war crimes outside of armed conflicts. A "movement" would not exist if its goals were already met.

71. In conclusion, nothing in the three declarations I have reviewed alters the opinion I expressed in my earlier declaration.

I declare under penalty of perjury under the laws of the United States of America that the above statements are true and correct.

Executed on July 19, 2005, in Chicago, Illinois.

s/*Eric A. Posner*
Eric A. Posner

COST OF TERRORISM

A GIANT UNPRECEDENTED LAWSUIT IS BEING FORMULATED: HUNDREDS OF VICTIMS OF TERRORIST ATTACKS WILL CLAIM BILLIONS FROM U.S. BANKS, ARGUING THAT THEY TRANSFERRED FUNDS TO HAMAS AND JIHAD.

The market price of an exploding *shahid* – $15,000. To organize an attack costs $50,000 minimum. How are these financed? According to a claim to be filed this week in the U.S., American banks have been serving for years as channels for the transfer of hundreds of millions of dollars from extremist Islamic organizations. Hundreds of Israeli victims of terror attacks are taking a stand for the first time against those who, they claim, are financing terrorist activities. Gabi Mairone, attorney and fighter, has recruited former SHABAK and Mossad personnel for a targeted economic assassination.

Tal Bashan

What is the cost of a "regular" *shahid,* killed in an encounter with Israeli forces? $10,000. And an exploding *shahid? $15,000.* How much does an attack cost? The one at Beit Lid cost $90,000, and at Afula – $50,000. And how much does the *shah id's* family get? 20,000 Saudi riyals, about $5,300.

Like everything else in our world, says attorney Gabi Mairone, Islamic terrorism also has a price, in dollars: "If you want to eliminate terror, you have to eliminate its financial sources, because without money the jihadist terrorism cannot exist. Period. That is their soft underbelly, and that is where we are aiming."

All this could have remained in the context of an interesting theoretical discussion, were it not for the

fact that Mairone, who is Jewish and born in Chicago, with offices in Israel and the U.S., has decided to take this task on his shoulders. Two and a half years ago he set up within his law firm, with the assistance of former Shabak (General Security Services), Intelligence and Mossad personnel, an organization called the Global Justice Group ("GJG"), along the lines of "Global Jihad", a basic concept in Islamic terrorism.

The goal: to collect information and legal proof of the dollar connection between – financing entities in Saudi Arabia and America and Hamas and Jihad, who perpetrate the attacks in Israel, via banks in the U.S., in order to file a civil suit on behalf of the victims of terrorist attacks in Israel against those banks. "I arrived here during the Intifada period, and I just couldn't sit still," says Mairone. "I wondered where I, as a private attorney, with my expertise, could contribute to the fight against terrorism. This is the most effective way I found: to strike at their finances and those who profit from terrorism – corporations, businessmen and banks."

It was a winding road, full of pitfalls and surprises, and particularly – expensive: Mairone has disbursed about $800,000 from his own pocket up to now – spent on thousands of hours of research and rummaging around the Internet, salaries to ten investigators and lawyers, weekly overseas flights, and recruiting American and British lawyers specializing in large-scale claims.

He takes no money from the victims of terrorism whom he represents (500 to date, with more joining every day), on principle. His fee, if any, will come from the success of his claim in court: 70% to the victims, 30% to the lawyers. "I want to help these people, not

make life more difficult. Every such victim is a devastated family. I know that it sounds strange these days, but for me this is a Zionist mission," Mairone explains.

Mairone, aged 52, wears his hair tied in a pony tail, rides a Harley-Davidson, and has a masters degree in international taxation. He looks a bit like Nick Nolte, but actually draws inspiration from Erin Brockovich. As will he remembered, the investigation started by this energetic secretary led to the filing of a billion-dollar claim against polluting electricity companies in the U.S., in the names of millions of victims, and ended in a historic victory. Mairone is trying to do the same thing against the financers of terrorism in America, headed by the banks operating in the U.S. Later on, he and his partners plan to sue corporations and individuals, "and it does not end in America. This front will continue in Chechnya, the Philippines, Bosnia, Europe. We want to strike at them wherever we can."

The Awakening After the World Trade Center Attack

After more than 2 years of preparatory work, Mairone and his people plan to file a claim for 2 billion dollars at the beginning of next week, in the names of hundreds of Israeli attack victims against Arab Bank – a Jordanian bank with branches in the U.S. and England, through which, he alleges, funds were transferred to entities who support llamas in the territories occupied by Israel. A further claim, against Citibank in the U.S., is planned to be submitted in the near future.

The claim will be filed by the firm of Mann & Mairone, together with H20, a well-known British law firm, and Motley & Rice, one of the largest law firms in the U.S., specializing in class actions, among them the civil action against Al-Qa'eda on behalf of the

victims of the "Twin Towers" attack, and a $246 billion claim against the tobacco companies.

Among the items in the claim: aiding sabotage and causing death, logistic assistance to terrorism, money laundering for the purpose of financing terrorism, and an item under U.S. law called the "Alien Tort Claims Act," one of the oldest items in U.S. law, enacted in 1789 against the King of England.

Being expert in international finance, says Mairone, the Intifada kindled in him the idea of striking at terrorism in this particular manner. "This is the American way of thinking, which grants a great deal of power to civil claims. I started to read material, inquired, among other things, into the in-depth studies by Steven Emerson (a reporter who has been investigating the issue since 1994, who wrote the book "Jihad America," and owner of a research institute on the subject – T.B.). I consulted with U.S. lawyers dealing with class actions. Until I got into the subject, I had no idea, for instance, of the whole religious aspect of terrorism, the extent to which it has penetrated deep into America and Europe. Nor did I know the depth of Saudi involvement in the financing of terrorism.

The victims asked me why claims were not being filed against Hamas or Jihad or the Palestinian Authority, and why it is being done in America. The answer is simple: if you sue terrorist entities from here, you will get nowhere. Even placing an attachment on the Authority's funds held in Israel is problematic and fraught with political pressures on the part of European countries. You have to know who to sue and where. We searched from the start for entities who were both helping to finance terrorism and who would be able to pay. Apart from that, you cannot

compare the amounts that could be awarded in America in torts cases to anything we know here. In the U.S., contrary to Israel, in addition to the damage compensation, there are also enormous punitive awards, and I am talking millions."

This is an unprecedented case, whether from the aspect of size, the identity of the defendants – legitimate American corporations, not Arab or Saudi charity foundations – and in particular the fact that the plaintiffs this time, contrary to all similar suits in the past, are not Americans but Israeli citizens. "U.S. law enables foreign citizens who are victims of terrorist attacks to file a civil suit against any entity with a legal presence in the U.S.," Mairone explains. "However, it is much more complicated, requires a great deal of investigation, and in contrast to suits by American citizens, to which the statute of limitations does not apply, to suits by foreigners it does." Thus, for instance, the case of the marines against Iran and the Hezbollah concerning an event that occurred in Lebanon in 1983 is still ongoing.

Claims based on terrorist attacks that occurred in Israel have been filed in the U.S. in the past, however, only by American citizens, and the majority were against Iran. The family of Alissa Flatow, an American citizen killed in an attack by Islamic Jihad in Kfar Darom in 1996, sued Iran for financing the terrorist activities of the Jihad, and years later was awarded $22 million out of Iranian funds frozen in the U.S.

The Boim family, whose son, David, was killed in the Hamas attack on Beit El in 1996, progressed another step when it filed suit two years ago against the financing entities of llamas: the Holy Land Foundation (HLF) and the Quranic Literacy Institute (QLI), two front organizations for Hamas domiciled in the

U.S. This week, the Federal Court awarded the family $150 million in compensation out of funds confiscated from the two organizations, which, in the meantime, have been outlawed in the U.S.

"In the Boim case, an interim ruling was handed down which is very important for our case," explains Mairone. "The judge ruled that the very transfer of the funds to the Hamas organization's front entities constitutes aid to financing terrorism. This ruling would not have been rendered before the attack on the "Twin Towers." There is no doubt that the Americans have become much more aware of the issue after September 11, among others with respect to dealing with the infrastructure of Hamas and Jihad, who have settled in the U.S. under all kinds of covers, and have built up a gigantic logistical infrastructure to finance terrorism. Until then these guys had flourished undisturbed. In fact, they were exploiting to the full all the Western values which they were planning to destroy in the name of Islamic Jihad: democracy, human rights, individual liberty. That is why I established Global Justice – to fight back in the name of exactly those same values."

The Banks Turned a Blind Eye

It is doubtful whether the neighbors in the old building in the heart of Tel Aviv knew that on the second floor there was a research organization loaded with computers and computer protection equipment, engaged in collecting evidence around the financing of terrorism. Mairone recruited for this task a staff of experts: Nahama Aloni, just out on pension from the Shabak, Dr. Reuven Paz, an expert on Arabs and the terminology used by the Islamic organizations, who brought with him students of Middle-Eastern studies, ex-Intelligence people, all fluent Arabic speakers. Kuti

Hadar, former senior legal advisor at the Shabak, is a lawyer who is helping to construct the testimony. Together with this staff are another two, working on a volunteer basis: Perry Golan, former head of the Shabak's southern division, and Pinni Meidan, a former Mossad employee (who served, among other things, as Ehud Barak's political adviser and was a member of the negotiating team at Taba), both managers of a security consulting company. Aloni, the Mid-East students as well as Dr. Paz and Kuti Hadar, would often sit in the office day and night, going through hundreds of Internet sites and Jihadist forums of Hamas, Al-Qa'eda, Islamic Jihad, Arabic newspapers and, particularly, the Saudi press.

"We scan 30-40 sites a day," says Sherry Koren, a former member of Intelligence Unit 8200 and a graduate student in Middle-Eastern studies. "The Internet is a very central tool to the Jihadists. They have thousands of ways to transmit messages via the Internet, including porno sites. Sometimes what you read makes you feel nauseous. The thing is that you really have to know the language and the internal codes. In English, their sites look totally different." Aloni says that that is exactly the problem encountered by the American investigators over the years: "They are not able to read the material in the original language, they have very few people who know Arabic, and they do not want to employ Israelis, for fear of another 'Pollard.'"

The majority of the sources were actually quite obvious, "but you had to know how to set out the puzzle and how to analyze it in order to prove that the money was really transferred to terrorism-supporting entities, and was used for the attacks for which those entities took responsibility," says Aloni. The material was collected gradually. Each time more material was

added to the puzzle from American legal sources, affidavits by FBI investigators, financial statements of banks and commercial entities in America, recordings of assemblies in mosques, documents seized from the Maqata'a, the Arabic press and the Internet. Nobody says so expressly, but it is obvious that the direct contact between the members of the team, all former Security Service members, with security entities in charge of this issue, has facilitated access to documents both in Israel and abroad.

Mairone's investigators claim to have found proof that millions of dollars flowed from Saudi entities via banks in the U.S. (among them the Saudi-American Bank, SAMBA, which was, until the end of 2003, a subsidiary of Citibank, and the New York branch of the Arab Bank) to entities engaged in Islamic education *(Da'wa)* and charity. The funds were often transferred only after they had been "laundered" by ostensibly innocent front organizations, research and education institutions, hospitals and libraries – all belonging to Hamas and Islamic Jihad. In other cases it was transferred directly to dozens of charity organizations in the occupied territories, such as Al-Salah, the Ramallah Charity Society, Zakat Tulkarem and the like, who assist Hamas and Jihad personnel and their families. Some of these have already been outlawed in Israel.

Aloni and the team gradually compiled a flow chart of the money and its movements from Saudi-Arabia via America, to entities supporting Intifada: the money comes from Saudi foundations and bank accounts, opened overtly and especially for the purpose of supporting the Palestinian struggle (Account 98, managed in many banks in Saudia, among them SAMBA, or the Charity Coalition of the extremist preacher, Sheikh

Qaradawi), through private donations, such as that of Prince Ibn Talal, for instance, a major Saudi businessman, who donated $26 million in a single contribution to the "Saudi Committee for the Intifada," and up to financial corporations and Saudi-owned banks, such as the Al Rajhi Bank.

In some cases the money goes through dozens of front organizations with vague names such as HLF (Holy Land Foundation); GRF (Global Relief Foundation; NAIT (North American Islamic Trust); MWL (Muslim World League); SAFA and others, scattered throughout the U.S., sometimes concentrated at the same address, some of which have been outlawed in the United States.

In the face of this overt information, how the funds are transferred and converted from Saudi riyals to dollars remains obscure. One of the greatest moments of the team was when checks transferred from those same Saudi entities via American bank accounts, to charitable societies that aid the struggle in the territories, were found in the files of the Intelligence Studies Center (which published the material seized as spoils in the "Din Ve-Heshbon" campaign).

Thus, for instance, the investigators have in their possession a check for $50,000 transferred from the account of the "Intifada Support Committee" in the Saudi-American Bank to the "Al-Ishan Charity Society," via Citibank, in October 2001. A check in the amount of $6,667 dollars was transferred from the Committee's account to the "Tulkarem Charity Society" in the same way. Another check to the Tulkarem Charity Society came from the Al Rajhi bank, belonging to a rich Saudi banking family, which owns dozens of corporations and foundations in the U.S. This check

was transferred via another large American bank, which is not presently being sued.

"Since the beginning of the 90s, due to cases of money laundering and organized crime, the banking laws and the Federal regulations forbid banks to manage large accounts without inquiring where the money is coming from and where it is going," explains Mairone. "Especially since September 11th, American banks are obligated to inspect transfers of funds by customers, and are required to refrain from assisting the transfer or laundering of terrorist funds. But some of them preferred to turn a blind eye, and now they will have to pay."

Hundreds of millions of dollars have been transferred to the various societies since the Second Intifada began. "The Saudi Intifada Support Committee alone has transferred $200 million," explains Aloni. "This arises, among other things, from the Islamic banking method: According to Islamic custom, every economic entity must set aside 2.5% of every transaction for charity, what they call 'Zakat'" – except that today this money goes almost exclusively to organizations connected with Hamas and Jihad." In the U.S., it turns out that Islamic societies domiciled there have been monitored since 1994. At a criminal trial that commenced not long ago against seven leaders of Islamic Jihad, among them Dr. Sami Al-Arian, Dr. Ramadan Shalah and others, who lived for years in Tampa, Florida, hundreds of hours of tape recordings and transcripts collected by the FBI were submitted. This material, among other things, was used by the Global Justice investigators to locate testimony on terrorism financing activity in the occupied territories.

Why did the American authorities not deal with them before September 11th?

During the course of her years of work, Aloni had been in contact with prosecuting and investigating entities in the U.S. "It took the Americans a long time to be convinced that this whole civilian system actually constitutes a logistical infrastructure to aid terrorism, of which it is an integral part, just as the food department or quartermasters stores in the IDF are part and parcel of the military organization. They were very cautious, as the Americans always are, but as soon as they decided to get going – they did it properly. Since the enactment of the Patriot Act, their emergency laws, everything has changed. Investigation methods, their attitude to the issue – the whole thing has gained momentum. A "Black List" has been started, which includes a great number of entities, organizations such as the Holy Land Foundation have been declared to be assisting Hamas and have been outlawed, their offices have been closed and $6 million have been confiscated."

Mairone finds no answer to the question that bothers him the most: how is it, after all this evidence, that Saudi-Arabia is not yet on the American list of countries that support terrorism, whose immunity must be removed, "except for American interests, headed by oil and the U.S. army stationed there, of course." "Here, the American double standard finds full expression," says someone in the Foreign Ministry. "With all that hard evidence on financing terrorism, the Americans are still very cautious with them, and the reasons are clear."

He survived the "Chinese Farm"

The man who has undertaken to sue banks of unimaginable power, compared with whom the tough Israeli bankers look like boys in a summer camp, has experienced many struggles and reversals of fortune. But it is doubtful if anything has prepared him for a crusade of this size, even if he says of himself: "All my life has been one long battle, mainly for Israel."

Mairone sees his role as one of connecting between his clients, the victims of terrorism, and the Federal Courts. "On the one hand, as an American attorney, I have been practicing American law in its most sophisticated forms for more than 25 years. On the other hand, as an Israeli. I and my family have been exposed to terrorism more than once." Mairone's children from his first marriage (he is now in his second marriage, where he has one child), presently 26 and 24 years old, grew up in Beit El with their mother, and were good friends with David Boim. Mairone's oldest son, Ariel, gave the eulogy at his graveside.

As a child in Chicago, Mairone fought with his parents to permit him to attend synagogue. "They were professed secularists; they were actually anti-Jewish," he says. "After my bar-mitzvah I wanted to study Judaism. I was attracted to it, but my parents did not agree. So I hitched a ride with the parents of my friends. At Hebrew School they arranged a scholarship for me, and then I went on to the Conservative Youth Movement, and from there to Orthodox Talmud. In 1968, as a high-school student, I went and signed up thousands of people on a petition against the French embargo of Israel, and presented it to the Senate. After being called 'Dirty Jew' so many times, it had become clear to me that we must defend ourselves, and that if we don't do it – nobody else will do it for us."

After studying philosophy for a year at Northwestern University, he immigrated to Israel in 1971, where he studied at the Merkaz Harav Yeshiva, and after a year of that he decided that his place was in the army. The Yeshiva was not very enthusiastic. His parents were adamantly opposed. "I went, hesitantly, to Rabbi Zvi Yehuda Kook, the head of the Yeshiva, and he asked me only one question: 'My son, what do you want?' I said, 'I want to join the army.' And he answered: 'The IDF is holy.' And that was that. I had received his blessing."

A short time after he joined the paratroops, the Yom Kippur war broke out, and interrupted his training in a special unit, which was subject to the GHQ Reconnaissance Company commanded by Yoni Netanyahu, and had been designated for a secret mission which was never executed. On Yom Kippur he hurried to Beit Lid, joined his unit in battalion 890, and was sent with his friends to the battle for the "Chinese Farm." Mairone belonged to the famous platoon commanded by Hezi Dachbash, whose story was told in Nir Toib's movie, "The Chinese Farm, A Record," about the platoon which was pinned down at the farm alone after all the other forces had retreated, and fought there for 17 hours. His saw his good friends killed right next to him, he moved Yurik and Rata and other wounded men to the APC and continued fighting. "It is totally unclear to me to this day how I survived."

Mairone is also very critical of what occurred at that battle, but in contrast to the other fighters, he preferred to remain silent until he was requested to testify not long ago before the IDF's Chief Historian. "I know that my friends were frustrated by what had gone on there, and had been silenced for years 'in the name of the bereaved families'. I was less bothered by

that, perhaps because I was living abroad and had simply suppressed the whole thing. I said, 'I want to cry, but not now', and that is how it remained."

He also fought in Lebanon, went to study philosophy at the Hebrew University intending to enter the teaching profession, married a religious girl, daughter of a family who had settled in the occupied territories, and worked for two years in the Prime Minister's office on matters that had best he kept quiet. "I still saw my place here, but we were very broke and had two children, so I decided to study in the U.S. and to return here with a law degree, although I had never thought of myself as the lawyer type."

Mairone earned his law and graduate degrees in international taxation at the New York University, and joined a large law firm, Sonnenschein, Carlin, where he was offered a partnership. The road to a comfortable and well-established American life had been laid down, but his goal was to make money quickly, and then return to Israel. With a partner he opened a financial company in Chicago, which, among other things, provided consulting on international taxation, and also dabbled in real estate, leasing and brokerage. Mairone made money and, true to his plan, he returned to Israel with the family in 1986, and joined the law firm of Herzog-Fox-Neeman as an intern. A year later he was divorced. His wife and children moved to Beit El, while he remained in Tel Aviv, where he found it difficult to cope with the burden of debts and child-support payments. He decided to repeat the American exercise: to go to Chicago and establish himself, and to return to Israel. In the end he remained another ten years in the U.S. When his older son joined the army and the younger completed his studies in Chicago, he decided to return to Israel – this time

permanently. He approached Scott Man, his friend from law school days in Chicago, who in the meantime had come to Israel with the group that settled in Eshhar, and set up a law firm in Afula. Together they opened an office in Tel Aviv.

While he was in law refresher courses and during his internship period, Mairone met his second wife, Tali, a British-born attorney. Their son was born two months ago. They live in Tel Aviv, and he continues to maintain his office in the U.S. and to provide consulting on international law to international clients. "All my income from my work I have transferred to my activities here. That is what I worked for."

After he decided to sue the American banks, Mairone approached the National Security Council, the Division for Combating Terrorism. "I wanted to know that the State had no objection to such activity, because I did not want to cause any conflict of interest. They were certainly impressed, although they were a little doubtful as to the possibility that I would be able to undertake this project, 'but if you think you can succeed – please, go ahead.' Actually, I knew that we were operating in a field that had fallen between the cracks. The government entities were busy with preventing and fighting terrorism in the here and now. The Intelligence Corps was busy collecting material on our neighbors. We entered a very specific niche, the civilian sector, which the government entities could not really find the time to handle."

At the first stage he had to establish an investigative organization, that would find the proof and construct the suit. He recruited his team by methods reminiscent of the American movies "Ocean 11" or "Armageddon", attaching himself to former service operatives who only wanted to go home in peace. Aloni

(48), the only woman on the team, was the first to be recruited. In the Shabak, she had been engaged in exactly this field, the operation and financing of terrorist organizations abroad. After 25 years in the service, Aloni, who looks more like a junior high school literature teacher than a terrorism investigator working with the American Ministry of Justice, was certain that now, at long last, she was about to enjoy life. "In January 2002 I enrolled in a course of study on art history", she smiles. "I promised my children that I would be home more and I turned in my beeper. My daughter asked, 'Mother, does this mean that there will be no more attacks?' I told her, 'There will be attacks, but without me.'

"When I came to Gabi for the first time I was rather suspicious – you learn to be skeptical in the service. I met a man who did not look like an attorney at all, with broad knowledge of the subject, and what most impressed me was that he did not think he had all the information at his fingertips. He said that he was an expert on international taxation, but for this suit he would be looking for partners who are expert in compensation. This seemed to me to be very un-Israeli – after all, Israelis are certain they can do everything by themselves and take all the money home. I also knew the importance of striking at the economic infrastructure of the terrorist organizations. We had been active in this field in the occupied territories since 1996, and it had been very evident. "Mere is no doubt at all that whenever the terrorist organizations' economic infrastructure is damaged it has a very strong effect on their ability to function."

Subsequently, the Arab expert, Dr. Paz, and his students joined, Aloni recruited Perry Golan, who had retired from the Shabak after 28 years of service, and

he brought with him his partner, Pinny Medan, a retiree from the Mossad. "We actually considered this a mission. A continuation of what we had been doing in the service, only with different tools," explains Golan. "For all of us, thwarting terrorism is a way of life. It took some time for us to absorb the new strategy, which is indeed totally different from that of the institutions where we had been working, but actually very sophisticated. You strike – with acceptable means and reasonable information – at the entity providing economic aid to terrorists, in the money transfer chain. There are a number of goals here, all important: to obtain compensation and relief for the families who are victims of terrorism, to thwart and stop the flow of funds to the terrorists, to expose large and respectable corporations before the American courts, as well as to assist Israeli propaganda efforts. That is a type of propaganda that is much more effective than what we have today."

Attorney Kuti Hadar, who had retired from 27 years of service, was also certain that a peaceful retirement was all that awaited him. But then he was called to a meeting with Mairone. "I had just planned a trip to India with my wife, when the phone call came from Nahama. I met with Gabi, was impressed by him, but I checked, consulted with my friends from the service, and was finally convinced. To tell the truth, at that time we had almost nothing in our possession – no material, no access to material and no international partners. Sometimes I can't believe we succeeded in getting it off the ground."

The Other Side of Terrorism

The claim to be filed this week is not a collective or class action. It is broken down into periods, attacks and organizations by which the plaintiffs were injured,

and specific damage. Gabi Mairone and his staff explain to the victims of terrorist attacks who join the suit that the battle will be long and difficult and a great deal of patience will be required. "These organizations are the strongest and richest in the U.S. and Saudi Arabia," explains Mairone, "and there is no doubt that they will hire the best lawyers that money can buy, and will endeavor to wear us down in a thousand and one ways."

The legal difficulties do not derive from the need to prove the responsibility of the terrorist organizations for these or other attacks. Hadar: "That is no problem, because most of the organizations officially took responsibility for the attacks they perpetrated." The difficulties lie in coping with the American legal system and its various modes of operation. For instance, the need to bring a separate affidavit for each document seized by the IDF, and to prove its authenticity. The first goal, the team's lawyers explain, is to organize the presentation of the evidence so that the claim will not be rejected in the preliminary stages.

Mairone decided right from the start to seek as his painter, a U.S. firm specializing in gigantic claims of this kind. "I went through maybe twenty firms," he says, "Some were skeptical, others were actually enthusiastic, but didn't want to become involved out of fear for their personal safety, and there were still others who feared that this enormous job would simply drown them."

The firm which eventually agreed to cooperate with him was Motley & Rice, which is suing Al-Qa'eda for a trillion dollars in the name of the September 11th victims, and filed compensation claims in the name of American citizens against the asbestos and tobacco companies, which ended in awards amounting to

millions of dollars (Rice was selected this year as one of the outstanding class actions attorneys in the U.S.). Mairone also found a senior partner in England: H20, which had filed a victims claim against the IRA (the Irish underground), and one of whose partners is Lord Brennan, attorney for the Queen of England. Both these firms, contrary to the practice in this sector, agreed to join the project for no retainer, on the basis of a percentage of the awards, if they win the case. "I sought serious partners, and I could never have found any more serious than these," says Mairone with satisfaction.

After they had formulated the suit, all that remained was to recruit the plaintiffs, thousands of victims of terrorism and their families. In the past year, Aloni, Hadar and Mairone have been touring the country among the associations and groups of terrorist victims, presenting the story of the suit, answering questions, trying to clear up concerns and signing up clients for the action.

"For free? Are you sure?" asked a survivor of the attack at Megiddo Junction at a convention held, ironically, at the Park Hotel in Netanya. Those present say that they had already been contacted by other attorneys on the same subject. And indeed, other claims of this type are being handled in the U.S., some with the assistance of Israeli entities. "But we are the only ones with this practical strategy. The only ones who have conducted such an extensive investigation and the only ones who have joined up with such strong overseas partners," Mairone attempts to convince his listeners.

"There were some who said that the issue is too painful for them, and they do not want to touch it," says Mairone. "Others were afraid for their personal

safety, but the majority of those we spoke with were eventually persuaded to join the action. The majority speak of justice, vengeance, stopping terrorism – not particularly about the money. Now victims are approaching us on their own initiative." "I don't know what I have to be afraid of," says Libby Sapanyov (20), who was working as a waitress at the Park Hotel in Netanya, and was severely injured in the attack. "The worst has already happened to me. The terrorist exploded a meter and a half behind me, I got a bullet in the chest, I was hit in the back, my face was burned. What do I have to lose? I can only gain from this suit – and I don't mean the money. The main thing is to strike at them, that they should have nothing to live from, that these funds should not sustain them." Sapanyov has already recruited other victims to participate in the suit.

It emerges that the organizations who deal with victims of terrorism are not always happy to help when it comes to legal claims. "The majority told us that they do not deal with that sort of thing," says Aloni. "We had to go from one to the other, by word of mouth. The organizations have lots of good intentions, but they are unable to bear the load of assisting these people – how much can one obtain from donors? They also get tired, the amounts of money required are enormous, there are families who have lost their breadwinners, people who suffered nervous breakdowns, expensive treatments, both physical and emotional."

The intensive encounter with the victims throughout this year, say Aloni and Hadar, left very deep residues. "In the service we were never exposed to this side of terrorism. It can be said that there was something sterile in our contact with the issue," says Aloni. "Here we are suddenly exposed to the victims' point of view,

the terrible stories, the bereavement, the complacency of the institutions, mainly the National Insurance. There are some encounters that never leave me, like one of the first we had with a family who were victims of the Dizengoff Center attack. In that meeting we heard somebody say something that has never left us. Margalit Gordon, who lost her daughter, Tali, at Dizengoff Center, told us: 'The money is less important, but if you could save one more mother the pain I and my family suffered – you have done the best you could.' That has been our motto since then. It has given us the motivation to carry on."

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

CV 04-5564 (NG) (VVP)

ORAN ALMOG, et. al.

Plaintiffs,

v.

ARAB BANK, PLC,

Defendants.

GILA AFRIAT-KURTZER, et. al.

Plaintiffs,

v.

ARAB BANK, PLC,

Defendants.

SECOND DECLARATION OF STEFAN TALMON

I, Stefan Talmon, declare as follows:

1. I have been asked by counsel for the defendant in the above-titled civil actions to supplement my Declaration of July 18, 2005 ("First Declaration") to deal with the recent developments at the United Nations and their implications for the question of a definition of terrorism in international law.

2. In my First Declaration, I concluded [at para. 86] that, while there was widespread condemnation of international terrorism and the financing of terrorism, "terrorism" and the "financing of terrorism" had not

yet been established as crimes under customary international law. One of the reasons advanced was that there was no generally accepted definition of terrorism in international law. Recent events at the United Nations, especially the adoption of Security Council resolution 1624 (2005) and the World Summit of September 2005, have reinforced that conclusion. The question of what constitutes "terrorism" remains as controversial as ever and, despite all attempts to reach agreement on a definition, remains unsettled.

3. The purpose of this Update is to make available to the Court the most recent United Nations documents and other material, that might otherwise not be familiar or readily available.

4. In this Declaration, I will deal with the following questions:

I. The Definition of Terrorism [paras. 5-15]

1. Security Council Resolution 1624 (2005) [5-7]

2. The 2005 World Summit Outcome [8-15]

II. The International Terrorist Financing Convention [16-18]

I. THE DEFINITION OF TERRORISM

1. SECURITY COUNCIL RESOLUTION 1624 (2005)

5. The Security Council at its 5261st meeting on September 14, 2005, meeting at the head of State level, unanimously adopted Resolution 1624 (2005) which concerns the prevention of incitement to terrorism. This non-binding resolution reads in part:

The Security Council, [...]

Condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, [...]

Reaffirming that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations, [...]

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

(a) Prohibit by law incitement to commit a *terrorist act or acts;* [...].[1]

6. Resolution 1624 (2005), like the other Security Council resolutions before [see my First Declaration, paras. 33-48], fails to provide a definition of "terrorism" or "terrorist acts"[2] The Security Council, once again, was divided over the question of whether to qualify the struggles of national liberation as terrorism. Only by omitting a definition of terrorism, could the agreement of all Council members (including the Arab and Islamic Council members Algeria and Benin)

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[1] S/RES/1624 (2005) of 14 September 2005 (emphasis added).

[2] See the statement of the President of Tanzania during the 5261 st meeting of the Security Council: "While we may not have a common definition and understanding of terrorism 1...]." (UN Doc. S(PV.526 I, 14 September 2005, 3).

be secured. The British paper, The Guardian, wrote on September 15, 2005 with regard to the resolution:

> A meeting of the UN security council unanimously passed a UK-sponsored resolution outlawing incitement to terrorism at home or abroad. But that has been undermined by the failure to agree a definition of terrorism. Middle East countries, in particular, insist some groups, such as the Palestinians, are engaged in legitimate resistance and are not terrorists.[3]

7. The division of opinion of Council members over a definition of terrorism is shown by the statement of the President of Algeria which reads in part:

> We would like to reiterate once again that we condemn all manifestations of terrorism. [...] There must also be an agreed definition of terrorism that will avoid any confusion between terrorism and the legitimate struggle of peoples for self-determination, a struggle which is covered by international law and international humanitarian law.[4]

2. THE 2005 WORLD SUMMIT OUTCOME

8. From September 14 to 16, 2005, more than 150 Heads of State and Government attended the 2005 World Summit, the High-level Plenary Meeting of the 60th session of the United Nations General Assembly. On September 16, the General Assembly adopted without vote Resolution 60/1 containing the Outcome Document of the 2005 World Summit. The Summit

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[3] The Guardian, Sept. 15, 2005, 22.

[4] UN Doc. S/PV.5261, 14 September 2005, 9.

Outcome deals with "Terrorism" in paragraphs 81-91. It reads in the relevant parts:

> 81. We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security. [...]
>
> 83. We *stress the need to make every effort* to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly. [...]
>
> 86. We reiterate our call upon States to refrain from organizing, financing, encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.[5]

9. While terrorism is strongly condemned, it is not defined. A definition of terrorism was originally included in the revised draft Outcome document of August 5, 2005 which reads as follows:

> 65. We strongly condemn terrorism in all its forms and manifestations, as it constitutes one of the most serious threats to international peace and security. We welcome the Secretary-General's counter-terrorism strategy and will consider it in the General Assembly with a view to adopting it. We affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified

[5] See UN Doc. A/60/L.1*, 20 September 2005 (emphasis added).

> or legitimized by any cause or grievance, and *we declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to carry out or to abstain from any act cannot be justified on any grounds and constitutes an act of terrorism.*
>
> 66. We *resolve to conclude* a comprehensive convention on international terrorism, including *a legal definition of terrorist acts,* during the 60th session of the General Assembly.[6]

10. The States could not, however, reach agreement on this definition, in large part because of the insistence of certain States, including most Arab and Islamic States, on an express exemption for resistance against occupying forces and for legitimate national liberation struggles.

11. Commenting on the 2005 World Summit Outcome Document Professor Frederic L. Kirgis wrote in an "Insight" published by the American Society of International Law: "There currently is no universally-accepted, comprehensive definition of terrorism in international law. Presumably in light of the difficulty in agreeing on such a definition, the final document

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[6] Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, UN Doc. A/59/HLPM/CRP.1/Rev.2, 5 August 2005, 20; also available at <http://www.un.org/ga/59/hlpm_rev.2.pdf> (last visited Oct. 11, 2005) (emphasis added).

removed a definition that appeared in the previous draft."[7]

12. The position of Arab and Islamic States was set out during the three days of debate in the General Assembly. The Minister of National Heritage and Culture, Special Envoy of His Majesty the Sultan of Oman, declared on September 16, 2005:

> Although we agree with the contention of the Secretary General of the United Nations that the absence of a comprehensive international convention to combat terrorism, based on a clear definition and a good knowledge of the causes and roots of this phenomenon has weakened international efforts to fight terrorism, we, on the other hand, believe that it is high time to implement an international strategy to fight terrorism based on co-operation and exchange of information among countries and the need to distinguish between the legitimate right to self-defense and resist aggression and terrorist acts carried out by outlaw individuals or groups that lead to the killing and terrorizing of civilians as a means and an end.[8]

13. The Foreign Minister of Sudan declared during the same debate:

> Based on our deeply-rooted belief that terrorism is a continuous threat to international

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[7] ASIL Insight, International Law Aspects of the 2005 World Summit Outcome Document, by Frederic L. Kirgis, October 4, 2005, available at <http://www.asil.org/insights/2005/10/insights051004.htm1> (last visited Oct. 11, 2005).

[8] http://www.un.org/webcast/summit2005/statements16/oman050916eng.pdf (last visited Oct. 11, 2005).

> stability and security, Sudan reiterates its condemnation of all forms of terrorism and calls for intensifying efforts to combat terrorism through concerted international endeavors, guided by the principles of international legitimacy. In this context, we support the call for holding an international conference to reach a consensual definition of terrorism and find ways for combating it. It is important to distinguish, and even draw a line, between terrorism and the legitimate right of peoples to resist foreign occupation.[9]

Similar declarations were made by other States.[10]

14. Of particular importance is the declaration of the Secretary-General of the Organization of the Islamic Conference who spoke on behalf of the "57 Muslim countries of the world and the Islamic World at large". In his statement of September 16, 2005 he said:

> "[...] the OIC rejects and condemns violence and terrorism. [...] we fully support and welcome the Security Council resolution 1624

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[9] http://www.un.org/webcast/summit2005/statements16/sud050916eng.pdf (last visited Oct. 11, 2005).

[10] The Prime Minister of Malaysia said on Sept. 14, 2005: "9. We must also maintain a distinction between acts of terrorism and the right of peoples fighting for self-determination. [...]." (http://www.un.org/webcast/summit2005/statements/malaysia050914eng.pdf – last visited Oct. 11, 2005). The Emir of the State of Qatar declared on Sept. 14, 2005: "I should not fail to stress the importance of arriving at a definition of the concept of terrorism, one that will allow the international community to distinguish between a despicable criminal act and peoples' right to resist occupation by armed struggle." (http://www.un.org/webcast/summit2005/statements/qatar050914eng.pdf – last visited Oct. 11, 2005).

(2005) adopted on the 14 September calling upon States to adopt measures to prohibit, by law incitement to commit terrorist acts. Yet, terrorism needs to be defined. To be equitable, any definition of terrorism should include State terrorism, and should not prejudice the rights of people struggling for their self-determination or under foreign occupation to resistance.[11]

15. Despite extensive negotiations and cooperation amongst States, there is still no agreed definition of terrorism. Indeed, a definition of terrorism seems to be further away than before. While in the draft document, world leaders would have "resolve[d] to conclude a comprehensive convention on international terrorism, including a legal definition of terrorist acts, during the 60th session of the General Assembly," in the final Outcome document they only "stress[ed] the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly." Thus the final document softens the stated intention to conclude the convention in the sixtieth session (which will run until fall 2006), and removes the stated intention to define terrorism.

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[11] http://www.un.org/webcast/summit2005/statements16/islamic050916eng.pdf (last visited Oct. 11, 2005). See also the OIC statement during the Counter-Terrorism International Conference held in Riyadh on Feb. 5-8, 2005: "1. The international community should come together under the UN to define terrorism that is comprehensive and in accord with the rights of the parties concerned. The OIC convention on Combating Terrorism linked terrorism to violence aimed at terrorizing people whatever its reason may be. However, at the same time it considered that armed struggle against occupation did not represent a terrorist crime." (UN Doc. S/2005/430, 1 July 2005, 77).

II. THE INTERNATIONAL TERRORIST FINANCING CONVENTION

16. In para. 82 of my First Declaration, I indicated that the Financing Convention and the Bombings Convention had been included by the United Nations Secretary-General in this year's annual treaty event, *Focus 2005: Responding to Global Challenges*, which took place from September 14 to 16, 2005. Since my execution of my First Declaration in this case, five more States have become parties to the Financing Convention.[12] Of the Arab and Islamic countries which were not parties to the Convention [see my First Declaration, para. 72] only Bangladesh and the United Arab Emirates became parties.[13] As of October 11, 2005 the total number of parties to the Financing Convention stands at 144 States. This still leaves a sizable segment of the international community of States outside the convention regime. It should be emphasized again, however, that the question we are concerned with in the present case is not one of mere numbers of parties to a treaty but of the content of the treaty in question and of the interpretation of the provisions of the treaty adopted by States [First Declaration, para. 81].

17. Since my execution of my First Declaration in this case, there has been additional controversy among State parties to the Financing Convention concerning the scope and meaning of the Convention. In particu-

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[12] Argentina, Bangladesh, Brazil, Jamaica, Kiribati, United Arab Emirates.

[13] But see the cryptic declaration made by Bangladesh on accession: "[The] Government of the People's Republic of Bangladesh understands that its accession to this Convention shall not be deemed to be inconsistent with its international obligations under the Constitution of the country."

lar, dispute has arisen whether the declarations of Egypt and Syria, excluding acts of national armed struggle and fighting foreign occupation from terrorist acts within the context of paragraph 1(b) of article 2 of the Financing Convention [see my First Declaration, para. 75], are in fact reservations that seek to limit the scope of the Financing Convention on a unilateral basis and are therefore contrary to its object and purpose.[14] These exchanges underline that there is a lack of consensus concerning the meaning and scope of the Financing Convention and the extent to which it should be interpreted to preclude acts of national liberation struggle and resistance against foreign occupation.

18. The number of parties to the Bombings Convention, which is referred to in para. 73 of my First Declaration, has also increased from 139 to 145 parties.[15] Of the Arab and Islamic countries, Egypt became a party on August 9, 2005 and the United Arab Emirates on September 23, 2005. As of October 11, 2005, six declarations excluding the Bombings Convention from the list of terrorist conventions to which

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[14] Austria (Aug. 25, 2005 [Egypt]; Sept. 12, 2005 [Syria]); Belgium (July 25, 2005 [Egypt]); Denmark (Sept. 15, 2005 [Syria, Egypt]); Estonia (Sept. 23, 2005 [Syria, Egypt]); Finland (July 20, 2005 [Egypt, Syria]); France (Aug. 15, 2005 [Egypt, Syria]); Germany (Aug. 16, 2005 [Egypt, Syria]); Netherlands (Aug. 30, 2005 [Egypt, Syria]); Portugal (Aug. 31, 2005 [Egypt, Syria]); Japan (July 14, 2005 [Jordan]). Similar objections had already been raised earlier by Austria, Canada, Denmark, Finland, Germany, Hungary, Italy, Japan, Netherlands, Norway, Portugal, Sweden, United Kingdom, United States of America with regard to Jordan's declaration.

[15] The six new parties are Egypt, Jamaica, Kiribati, Nauru, Saint Vincent and the Grenadines, United Arab Emirates.

the Financing Convention applies were still in force.[16] This means that for 52 States the financing of bombings within the meaning of the Bombings Convention is not yet a treaty offence under the Financing Convention. Again, the caveat as to mere numbers applies [First Declaration, para. 81].

CONCLUSION

19. Recent developments at the United Nations confirm that while there is almost unanimous condemnation of international terrorism, such consensus appears to depend on the absence of a definition of "terrorism". Each time the international community has actually sought to agree on a definition of terrorism, the lack of consensus concerning such a definition has become clear.

Respectfully submitted

Stefan Talmon

University Lecturer in Public International Law,
Oxford University

Fellow of St. Anne's College, Oxford

October 11, 2005

I declare, under penalty of perjury and the laws of the United States of America, to the best of my knowledge and belief, that the statements made in this Declaration are true and correct.

Executed on October 11, 2005, at St. Anne's College Oxford, United Kingdom.

/s/ Stefan Talmon
Stefan Talmon

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[16] The States in question are the Cook Islands, Jordan, Singapore, Syria, Thailand and Viet Nam.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TO BE FILED UNDER SEAL

Case Number: 04-CV-5564

ORAN ALMOG, et al.,

Plaintiffs,

v.

ARAB BANK, PLC,

Defendant.

DECLARATION OF ANNE T. VITALE IN SUPPORT OF DEFENDANT ARAB BANK, PLC'S MOTION FOR RECONSIDERATION OF THE COURT'S DECEMBER 13, 2006 ORDER OVERTURNING MAGISTRATE JUDGE POHORESLSKY'S MARCH 24, 2006 DECISION AND ORDER

Anne T. Vitale, hereby declares under penalty of perjury, pursuant to 28 US.C. § 1746 that the following is true and correct:

1. I am an attorney admitted to practice law in the State of New York and I am President of VITALE AML CONSULTANTS, INC., which provides advice to financial institutions on compliance with anti-money laundering regulations, including measures regarding terrorist financing.

2. I have read the transcript of the hearing on November 14, 2006 and the Court's decision on December 14, 2006. I submit this affidavit on behalf of Arab Bank's Motion for Reconsideration in order to clarify the nature of cover payments, which are a customary and accepted means of wire transfers between banks.

3. From 1983 through 1990, I was an Assistant United States Attorney in the Southern District of New York, where I prosecuted narcotics, money laundering and organized crime cases. In 1988, I was Deputy Chief of the Narcotics Unit and in 1989, I was Chief of the General Crimes Unit.

4. From 1990 through 1999, I was Deputy General Counsel at Republic National Bank of New York ("Republic"), where I was responsible for its global anti-money laundering program, litigation and investigations. From January 2000 through June 2001, after HSBC had acquired Republic in January 2000, I was in charge of a securities fraud investigation for HSBC.

5. In July 2001, I started my own law practice and in November 2004, I incorporated VITALE AML CONSULTANTS, INC. I have been retained by large international banks, retail banks, international private banking institutions, and banks that engage principally in correspondent banking to advise them on anti-money laundering programs.

6. In March 1999, I testified as an expert before the House Committee on Banking and Financial Services, which was investigating the flow of funds from Russian Banks through correspondent banks to individuals and entities at Bank of New York, which became known as the "Bank of New York case."

7. In September 1999, I testified as an expert before the Senate Sub-Committee on Investigations, which was investigating money laundering through correspondent banking.

8. Correspondent banking basically constitutes banking services provided by one bank to another bank. Such services include deposit accounts, loan facilities, clearing of domestic and international payments, check clearing, foreign exchange, trade financing facilities, etc.

9. Dollar wire transfer payments are processed and settled through the FedWire Funds Service operated by the Federal Reserve Bank ("FedWire") or the Clearing House Interbank Payments System ("CHIPS"). Payments are settled in batch payments that net the credits and debits to a particular bank.

10. FedWire processes and settles the majority of U.S. domestic dollar wires and CHIPS processes and settles approximately 95% of all U.S. dollar cross-border payments.

11. When one bank has accounts for both the originator and beneficiary of a payment instruction, an efficient alternative to a FedWire or a CHIPS payment is a book entry, which processes and settles the transactions internally, on the books of the bank.

12. It is important to note that payments are separate from payment instructions, which may be sent by the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") (the industry owned co-operative supplying standardized messaging services to approximately 8,000 financial institutions in 206 countries), telex, or fax. (I understand that the payment instructions in question in this case are SWIFT messages.)

13. Wire transfer payment instructions include bank to bank instructions (SWIFT MT 202s), which are initiated by a bank, and not by non-bank third party customers.

14. The SWIFT MT 202 bank to bank payment instruction generally lists one bank as the originator and a second bank as the beneficiary. SWIFT MT 202 bank to bank payment instructions will specify the names of two U.S. banks when the originator and beneficiary hold their accounts at two different U.S. banks or the name of one U.S. bank when both the originator and beneficiary hold their accounts at one bank.

15. Bank to bank wire transfer payment instructions are regularly and ordinarily used in the normal course of international and domestic banking when a bank purchases foreign exchange, makes an investment, funds operations, finances loans or letters of credit, settles its accounts or issues a cover payment to transfer aggregate or individual amounts to fund its obligations.

16. As one type of bank to bank payment instruction, a SWIFT MT 202 bank to bank payment instruction that is referred to as a bank to bank cover payment is routinely and customarily used to permit a domestic or international bank to advise of the debit of dollars from its account in the U.S. and a credit of dollars to a second account in its name or the name of another bank with minimal if any charges and typically within a one day period.

17. SWIFT MT 202 bank to bank cover payment instructions do not imply a "coverup," rather they are cost-efficient and timely entries of debits and credits between bank accounts.

18. For example, just as an individual may debit $20,000 from her money market account to credit her checking account to cover 20 checks aggregating $20,000, a bank may debit the amount of $200,000 from one account in one payment instruction in order to credit a second account at the same or another bank to cover 200 individual payments instructions. Alternatively, a bank could debit from its account $200,000 through individual payment instructions, called SWIFT MT 103 payment instructions, detailing the specific individual originator and the specific individual beneficiary, however, because banks charge an average fee for a SWIFT MT 103 from $20 to $40 per transaction per bank and the processing time may extend over a 24 hour period, banks in Europe, the Mid-East and Asia often use SWIFT MT 202 bank to bank payment instructions to aggregate amounts in order to effect same day payments.

19. For example, a bank in Japan having one US dollar account at Citibank may have to debit $1,000 from each of 200 accounts of individuals in Japan who are Thai domestic workers, in order to effect a credit to a bank in Thailand, which has a US dollar account at Chase. If the bank in Japan were to send separate MT 103 payment instructions listing the names of 200 individuals, the bank in Japan, Citibank, Chase and the bank in Thailand could each deduct approximately $20 to $40 per instruction for a range of fees that could amount to $80 to $160 per transaction. Because of the time differences between Japan and the U.S. and the U.S. and Thailand, the detailed processing of such payment instructions may take over 24 hours.

20. Alternatively, the bank in Japan could send one SWIFT MT 202 bank to bank cover payment instruction in the amount of $200,000 to Citibank

instructing it to pay Chase for benefit of the bank in Thailand. Simultaneously, the bank in Japan may send a fax or MT 103 payment instructions directing the Bank in Thailand to credit 200 customers $1,000 each without providing this information to the banks in the U.S. The processing time involved in sending a SWIFT MT 202 bank to bank payment instruction (including the fax or the SWIFT MT 103 instructions directly to the bank in Thailand) would be within 24 hours and would cost each customer much less than $80 to $160.

21. In order to give the Court some magnitude of the number of transactions involving both payments and payment instructions, I am providing the Court with the following statistics from CHIPS and SWIFT. CHIPS cleared approximately 300,000 transactions totaling $1.5 trillion on an average day in 2006. The total number of SWIFT messages, including MT 202s, approximated over 12 million per day in November 2006.

22. Based on my experience, one example of the volume of bank to bank wire transfer instructions processed through a licensed U.S. branch of a legitimate foreign bank, which cleared dollar payments as part of its correspondent banking services, included the processing of approximately 400,000 to 450,000 SWIFT MT 202 payment instructions totaling approximately $750 billion during the course of a one year period. Included in these figures is a subset of 20,000 SWIFT MT 202 bank to bank payment instructions totaling $2.2 billion, which were cover payment instructions that only provided the names of bank originators and bank beneficiaries and did not provide the names of any third parties.

23. I have been approved by the Federal Reserve Bank, the Office of Thrift Supervision and the Office of the Comptroller of the Currency to conduct reviews of wire transfers through correspondent banking when banks have been the subject of enforcement actions. The wire transfer activity that has been the subject of concern for the regulators in both the enforcement actions in which I have been involved, as well as the ones that I have reviewed, related to third party payment instructions and not to bank to bank payment instructions, which did not provide the names of third parties.

24. As the FinCEN order stated: "Arab Bank-New York focused on direct customers of Arab Bank-New York, as opposed to originators and beneficiaries without accounts at Arab Bank-New York. Arab Bank-New York extended transaction monitoring and review to only those individuals and entities that Arab Bank-New York viewed as direct customers of Arab Bank-New York." FinCEN's order criticized Arab Bank New York for failing to monitor transactions involving identified third parties, who did not have a New York account. FinCEN did not criticize Arab Bank New York for payments originated by or for the benefit of correspondent banks, which had direct accounts at Arab Bank-New York and which conducted transactions involving bank to bank payment instructions, which did not list third party originators and beneficiaries.

25. Indeed, other than to process a SWIFT MT 202 bank to bank payment instruction, listing only the originator bank and the beneficiary bank and their respective countries through a filter consistent with a list of sanctioned countries and names issued by the Office of Foreign Asset Controls, there is little that any

bank can do to monitor such transactions for money laundering or terrorist financing, simply because there is no information relating to third parties to monitor. In an excess of caution, some banks have monitored aggregate monthly volumes of bank to bank payment instructions, but this comparison of aggregate monthly volumes has little significance in identifying potentially suspicious activity.

26. Finally, when I was employed at Republic National Bank of New York and when I was retained as a consultant for other banks, I was intimately involved with numerous examinations by federal bank examiners. The regulators examine a bank for an extended period of time, often for several weeks or months. The banks provide regulators with space and access to their systems that process their transactions and their documents. Unless a regulator asks specific questions relating to specific transactions, it is impossible for a bank to know which transactions the regulators examine.

27. The processing of international wire transfer payments and payment instructions is complex and staggering in volume and U.S. dollar amounts. I have been monitoring wire transfer activity through correspondent banking at numerous banks for approximately ten years. During this time, I have repeatedly rated activity relating to bank to bank payment instructions in which no third party is mentioned as low risk activity for money laundering because they provide no relevant information when considering whether suspicious activity may be involved. Regulators have consistently accepted this rationale and rating.

Dated: Naples, Florida
December 23, 2006

/s Anne T. Vitale _____
Anne T. Vitale (AV 2791)

[SEAL] REPUBLIC OF LEBANON
MINISTRY OF FINANCE

THE MINISTER

The Honorable Nina Gershon
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Linde, et al.V. Arab Bank, PLC, Case No. 04-2799 (E.D.N.Y.) (NG) (VVP), and related actions

Dear Judge Gershon:

I am submitting this letter with regard to a recent decision authored by your Honor in which "significant sanctions" are imposed on Arab Bank plc for complying with the Banking laws of the Republic of Lebanon. That decision, which is dated July 12, 2010, violates principles of mutual respect for the laws of sovereign nations and puts a commercial enterprise in a untenable position of having to choose between breaking the laws of our Republic where it operates and being subject to severe sanctions in a courthouse in the United States for doing so. It is imperative that such considerable conflicts be avoided and that principles of mutual respect are adhered to by our two nations.

Contrary to your Honor's conclusion that Arab Bank not face prosecution for violating the laws of Lebanon, we wish to state clearly that Lebanon will seek to enforce its laws by instituting legal action against Arab Bank and its employees if it attempts to comply with the discovery orders of this Court.

It is the judgment of our Republic that our Banking Secrecy Law serves our national interests and must

be protected. This law requires bank managers and employees to maintain the absolute confidentiality of customer accounts. Article 8 of this law imposes criminal penalties upon any person who violates an account holder's right to confidentiality.

The stipulations of this law cannot be altered or waived by any governmental authority, whether judicial, financial or other, except for the special Investigation Commission of our Central Bank, who under very limited exceptional circumstances has the authority to order the lifting of confidentiality of an account.

We are aware of the serious nature of the charges that Arab Bank is confronting before your Court. In line with all international standards, Lebanon enacted in 2001 its own anti-money laundering laws addressing anti-terrorism financing, which it expects all businesses and persons operating within Lebanon to follow. Lebanon will prosecute violators of these laws.

Lebanon also works cooperatively with the United States, as well as other nations, through international agreements to prevent money laundering and terrorism financing, but it also expects such nations to recognize and respect its national laws.

To be clear, while Lebanon is committed to cooperating with the United States and other nations in connection with efforts of the law enforcement and national security communities to investigate and prosecute the financing of terrorism, it remains the case that financial institutions operating within Lebanon must comply with its Banking laws and that these laws must not be derogated as a result of any action, whether by a party instituting a claim for monetary damages in a United States courthouse, or otherwise.

In light of the above, we request that this Court's decision to impose a significant sanctions" against Arab Bank for its compliance with the Banking laws of Lebanon be reconsidered to reflect the recognition of such laws.

A duplicate copy of this letter will be delivered in Beirut to H.E. the Ambassador of the United States of America to Lebanon.

Respectfully yours,

/s/ Raya Haffar
Raya Haffar
Minister of Finance

[SEAL] Palestine Monetary Authority

Ramallah - Al Bireh P.O. Box 452 -
Tel.: 02-2409920 - Fax: 02-2409922

Gaza - P.O. Box 4026 -
Tel.: 08-2825713 - Fax: 08-2844487

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Ref: 166 GVNR/08/2010

Date: 25/08/2010

The Honorable Nina Gershon
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Linde, et al. v. Arab Bank, PLC*, Case No. 04-2199 (E.D.N.Y.)(NG)(VVP) and related actions

Dear Judge Gershon,

I am the Governor of Palestine Monetary Authority ("PMA") and write to supplement the two letters to Your Honor from George T. Abed, former. Governor of PMA, dated April 3, 2006 and September 19, 2007. I also understand that. Dr. Ali Kashan, the Palestinian Authority's Minister of Justice, submitted a letter, dated September 29, 2007, to Your Honor.

I understand that, by Order dated July 12, 2010, the Court imposed sanctions on defendant Arab Bank, PLC for failing to comply with Orders that would have required the Arab Bank to violate Article 26 of the Palestinian Banking Law No (2) of 2002, which requires that all present and former directors, officers, and employees of banks shall keep confidential all

information' and documents regarding their customers. I request the opportunity to briefly emphasize the importance of the bank confidentiality provisions in the law at issue.

PMA, which functions as the central bank for the Palestinian Territories, shares the goals of all nations that have enacted bank confidentiality laws and other similar legislation. Preventing domestic and foreign private parties from having unrestricted access to the confidential records of banking customers is vital. Failing to comply with such international standards and best practices not only undermines the willingness of ordinary, law-abiding banking customers to utilize, and thereby strengthen, the banking system, but moreover will negatively impact the financial stability and cause distress to the economy.

PMA cannot perform its functions if Palestinians are disincentivized from utilizing the banking system within the Palestinian Territories because of the risk that any party local or foreign including any resident of Israel, could file a lawsuit, with or without merit, and request through discovery the production of banking records of Palestinians, regardless of substantive merit or relevance. The obvious effect, apparent to anyone who is familiar with the actual conditions and circumstances in the Palestinian Territories, would be the flight of individual customers from the Palestinian banking system, with the residual impact on the ability, of the PMA to regulate that system, including the identification and interdiction of unauthorized or illegal monetary transactions. The PMA since its establishment played a vital role in setting foundations fora sound and transparent banking system in compliance with international laws and standards. It is determined to maintain and strengthen this sector under

such international standards amongst them bank secrecy.

PMA is committed to the goal of achieving a banking system that is devoid of illegal transactions, particularly those that are intended to support or contribute to Violence or terrorism. PMA is playing a critical role in enforcing anti-money laundering law and anti-terrorism banking regulation in the West Bank and Gaza. If customers are discouraged from utilizing the banking system by events such as Your Honor's, issuing her July 12, 2010 Order, the impact on the banking system and the economy in the Palestinian Territories will be dramatic, the means of eliminating illegal banking activity will be thwarted, and the potential risk of that activity will be elevated. I respectfully request that the Court reconsider its Order and the impact it will have.

I am happy to answer any questions the Court might have regarding the foregoing or the issues pending before the Court on the Arab Bank's motion for reconsideration.

Sincerely,

/s/ Dr. Jihad Khalil Ai Wazir
Dr. Jihad Khalil Ai Wazir
Governor

[SEAL] Palestinian National Authority

Office of the Prime Minister

No: P.M/U.S.D.C/40/2010

Date: 30/08/2010

The Honorable Nina Gershon
United States District Court
Eastern District of New York

Dear Judge Gershon,

I have had the opportunity to read the letter of the Governor of the Palestinian Monetary Authority ("PMA") to you dated August 25, 2010, and hereby wish to indicate my agreement with the views of the PMA on the important subject that is before you.

Sincerely,

/s/ Salam Fayyad
Salam Fayyad
Prime Minister

[SEAL] PRIME MINISTRY

THE HASHEMITE KINGDOM OF JORDAN – AMMAN

Amman, August 31st, 2010

The Honorable Hillary Rodham Clinton
Secretary of State
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Madam Secretary:

On behalf of the Government of the Hashemite Kingdom of Jordan, I respectfully write to express the Kingdom's growing concern related to recent developments in the U.S. litigation against Arab Bank in the United States District Court for the Eastern District of New York. In particular, the Jordanian Government is deeply concerned about the U.S. court's July 12, 2010 order imposing significant sanctions against Arab Bank arising out of Arab Bank's compliance with Jordanian banking laws.

The Hashemite Kingdom of Jordan has the utmost respect for the United States and the courts of the United States. The Jordanian Government has serious concerns, however, regarding the effect of the U.S. court order on the leading financial institution based in the Kingdom. Arab Bank is a pivotal force of economic stability and security in the Kingdom and the broader region. The nature and severity of the sanctions imposed against Arab Bank and the U.S. court's interpretation of Jordanian banking laws raise serious national security concerns for the Kingdom.

As the Jordanian Government understands it, the court's order imposes sanctions upon Arab Bank in the form of allowing a jury in the litigation to draw

adverse inferences as to liability against the Bank at trial and precluding Arab Bank from offering certain evidence in its defense. The Jordanian Government farther understands that the reason for the imposition of such sanctions was Arab Bank's objection to producing documents in the litigation in a manner prohibited by Articles 72 through 75 of the Jordanian Banking Law, as well as the laws of other jurisdictions, regarding confidentiality of banking records.

The Hashemite Kingdom of Jordan is committed, as a signatory to various international treaties, to affording to the United States and other nations the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts. Jordan's cooperation in this regard, and its commitment to fight terrorism, has been widely recognized. Nevertheless, it would be inaccurate to construe the Kingdom's continued commitment to providing such assistance to other nations for law enforcement or national security purposes as evidence of any general intention by the Kingdom to relieve a financial institution operating in Jordan of its obligations to comply with Jordanian banking laws concerning the confidentiality of customer accounts.

Arab Bank has requested, through the available and proper legal channels in Jordan, that it be relieved of its obligations under the banking laws so that it may disclose in the pending U.S. litigations documents relating to certain of its customer accounts in Jordan. The Bank has been informed by the Minister of Justice of the Hashemite Kingdom of Jordan that the law does not authorize him to issue an order that would permit Arab Bank to violate those provisions of the Jordanian

Banking Law that mandate the confidentiality of customer accounts. The Governor of the Central Bank of Jordan also has informed the Bank that any violations by Arab Bank of these banking laws will expose it to the imposition of sanctions and the initiation of legal action seeking damages.

The Hashemite Kingdom of Jordan considers those articles of its basing laws that require that banks maintain the confidentiality of customer account records to be essential provisions of the Banking Law of 2000. These provisions are laws of general application and implicate principles of law and policy that are of fundamental importance to the sovereign and national security interests of Jordan

The Jordanian Government expects its citizens, including financial institutions, to abide by the laws of the Kingdom, as well as the laws of each jurisdiction in which they operate. Arab Bank, similar to other financial institutions operating under Jordanian law, is expected to abide by the Kingdom's rules. This remains the considered position of the Hashemite Kingdom of Jordan.

On behalf of the Hashemite Kingdom of Jordan, I respectfully convey the Kingdom's highest regards.

Respectfully,

/s/ Samir Al-Rifa'i

Samir Al-Rifa'i
Prime Minister

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case Number: CV 06-3869

JOSEPH JESNER, et al.,
Plaintiffs,

v.

ARAB BANK, PLC,
Defendant.

DECLARATION OF PROFESSOR RALPH G. STEINHARDT

Washington, D.C.
United States of America

1. *Biographical statement.* I am the Arthur Selwyn Miller Research Professor of Law and International Relations at the George Washington University Law School, in Washington, D.C. I am a member of the District of Columbia bar and am admitted to practice in numerous federal courts, including the Supreme Court of the United States. At the Law School, I teach courses in a range of international subjects that are relevant to this litigation, including public and private international law and have taught international and comparative human rights at University College Galway (Ireland) and at Oxford University. I am also the co-founder and -director of the Oxford Programme in International Human Rights Law, held since 1995 at New College, Oxford (U.K.). My scholarly specializations include the application of international law in domestic courts and international human

rights law. I have published in those fields since 1980, including *Multinational Corporations and Their Responsibilities Under International Law* in CORPORATE ACCOUNTABILITY FOR ADVERSE HUMAN RIGHTS IMPACTS: NEW PARADIGMS AND EXPECTATIONS (American Bar Association, in press); HUMAN RIGHTS LAWYERING, published in 2008 by West Publishing (with Hoffman and Camponovo); INTERNATIONAL CIVIL LITIGATION, published in 2002 by Lexis/Nexis; and THE ALIEN TORT CLAIMS ACT (with D'Amato) published in 1999 by Transnational Publishers. My lectures on the human rights obligations of multinational corporations, at the Human Rights Academy of the European University Institute in Florence, have been published by Oxford University Press under the title, "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*," in NON-STATE ACTORS AND HUMAN RIGHTS (Alston ed. 2005). My article analyzing some of the issues in this case, entitled "Laying One Bankrupt Critique to Rest: *Sosa v. Alvarez-Machain* and the Future of International Human Rights Litigation in U.S. Courts," appears at 57 VANDERBILT LAW REVIEW 2241-2301 (2004). In 2006, the International Commission of Jurists appointed me to its Expert Legal Panel on Corporate Complicity in International Crimes – the only U.S. member of the panel. I have also appeared as an expert witness in other alien tort litigation raising the issue of corporate liability. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 315, 316 (S.D.N.Y. 2003) and 374 F. Supp. 2d 331 (S.D.N.Y. 2005). In addition, I have been co-counsel in several cases under the Alien Tort Statute, including as co-counsel to the respondent in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004) ("*Sosa*"). A complete listing of these cases and relevant

publications appears in my *curriculum vitae*, attached at Annex 1.

2. *Purpose of declaration.* I offer this declaration for the purpose of laying before the Court a body of legal principles pertinent to the issue of corporate liability under the Alien Tort Statute after *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (April 17, 2013). The relevant evidence of international law in the courts of the United States was identified over a century ago:

> where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, *as evidence of these, to the works of jurists and commentators* who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis supplied). I here submit points and authorities in support of the argument that nothing in international law creates or allows a law-free zone of impunity for companies. To the contrary, international law in all three of its three dominant forms – (1) treaties, (2) customary international law, and (3) "general principles of law recognized by civilized nations" – allow and in broad circumstances require the imposition of liability on private actors including multinational corporations for violations of international law.

3. *Summary of findings.* Each of the three primary types of international law establishes independently that corporations are not immune from responsibility under international standards. In the paragraphs that follow, I draw first on general principles of law recognized by civilized nations, which uniformly acknowledge corporate personality and the legal responsibility of companies. Second, I show that treaties establish that corporate behavior, long internationalized as a commercial matter, has been internationalized as a legal matter: governments have repeatedly used international agreements to impose specific legal obligations on corporations. That these obligations are typically enforced through the instrumentalities of domestic law proves only that corporate responsibility is like other international legal obligations and does not amount to a justification for treating corporations differently from human beings. Third, for at least two hundred years, customary international law has recognized the legitimacy of holding non-human entities accountable for egregious violations of international norms. Taken together, these three dominant sources of international law flatly contradict the argument that corporations occupy some ersatz legal space devoid of international standards.

General Principles

4. *General principles as a source of international law.* Treaties and custom, though perhaps the most familiar forms of international law, are not the only sources for determining the content of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). Domestic courts may also consider "general principles of law recognized by civilized nations" as a source of international law. *See* Statute of the

International Court of Justice, art. 38(1)(c). Section 102(1)(c) of the RESTATEMENT (THIRD) specifically provides that "[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from *general principles common to the major legal systems of the world*" (emphasis supplied). Arguments from general principles require a demonstration that a particular legal norm or maxim recurs in the domestic legal systems of representative jurisdictions worldwide. International law is routinely established through this systematic exercise in comparative law. *See generally* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS 390, 392 (2006) (noting that general principles encompass "the fundamental principles of every legal system" and that they "belong to no particular system of law but are common to them all"). In the United States, the Supreme Court has repeatedly used general principles to determine the content of international law. *See, e.g., United States v. Smith*, 18 U.S. 153, 163-80 (1820); *Factor v. Laubenheimer*, 290 U.S. 276, 287-88 (1933); *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623, 633 (1983).

5. *Summary of research into general principles.* Rather than work through the legal system in the nearly two hundred countries in the world, I have undertaken a representative sampling of various legal systems to determine whether there are general principles of corporate liability across (i) common law jurisdictions (like Great Britain and the United States), (ii) civil law jurisdictions (like most of continental Europe and East Asia), and (iii) Islamic law jurisdictions. *See generally,* Jan Smits, ed., ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (2nd ed. 2012); Larry Backer, COMPARATIVE CORPORATE LAW: UNITED

STATES, EUROPEAN UNION, CHINA AND JAPAN (2002); W.V.H. Rogers, ed., UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS *passim* (2004); R. Youngs, ENGLISH, FRENCH, AND GERMAN COMPARATIVE LAW 228-9 (1998). There is no legal system in which corporations are in principle exempt from civil liability. To the contrary, although many legal systems do not extend criminal liability to corporations *per se*, none has created or recognized similar immunities from tortious or delictual responsibility. Corporations are routinely required through civil proceedings to make compensation for harm caused. In other words, the uniform recognition of corporate personality and liability in domestic legal systems around the world demonstrates – independently of treaties or customary international law – that legal responsibility accompanies legal personality.

6. *Corporate personhood and responsibility as a general principle in the International Court of Justice.* The International Court of Justice has explicitly recognized corporate personhood – meaning *inter alia* the ability to sue and be sued – as a general principle of law, based on the "wealth of practice already accumulated on the subject in municipal law." *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, 38-39 (Feb. 20). The connection between international law and domestic law – especially with respect to corporate personality – was reaffirmed by the ICJ in the *Case of Ahmadou Sadio Diallo:*

> In determining whether a company possesses independent and distinct legal personality, *international law looks to the rules of the relevant domestic law.*

Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 190 (May 24) at 194 (emphasis added).

7. *Domestic rules of corporate responsibility.* It is readily demonstrated that corporate responsibility for serious harms is a universal feature of the world's legal systems and therefore qualifies as a "general principle of law." The law of the various nations does not necessarily use the terminology of international criminal law or international human rights law in detailing the scope of liability that attaches to corporate personality, but it is the substance and not the label that counts in the discernment of general principles. Every national jurisdiction protects interests such as life, liberty, dignity, physical and mental integrity, when these are threatened by corporate action. Certainly no legal system exempts corporations altogether from the obligation to compensate those they injure. As determined by the United States Court of Appeals for the District of Columbia Circuit, "[l]egal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood." *Doe v. Exxon Mobil Corp.* 654 F.3d 11, 53-54 (D.C. Cir. 2011).

Framed as a rule of positive liability, virtually every legal system around the world encompasses some form of tort law (or delicts) that applies to corporations. In some legal systems, this can take the form of actual criminal or quasi-criminal liability in addition to civil liability or administrative sanction. *See* Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating* Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841,

886 (2009) (discussing the *action civile* in Argentina, Belgium, France, Japan, the Netherlands, and Spain, under which a victim of a crime may seek civil damages against a criminal defendant). *See also* Allens Arthur Robinson, "Corporate Culture" As A Basis for the Criminal Liability of Corporations (Feb. 2008), available at http://www.reportsandmaterials.org/Allens-Arthur-Robinson - Corporate - Culture-paper-for-Ruggie-Feb-2008.pdf. Framed instead as a general principle of non-immunity, there is no domestic jurisdiction that completely exempts corporations from all liability for their civil wrongs, although there is variation in the principles of attribution ("piercing the corporate veil") and remedy (including the measure of damages).

Over the last decade, every comprehensive survey of domestic law on corporate liability has confirmed that corporate liability is the rule, with only isolated and peculiar exceptions. In 2008, for example, the International Commission of Jurists Panel of Legal Experts undertook a global inventory of domestic law addressing corporate criminality – a more contested issue than corporate civil liability or administrative sanctions against companies – and determined that general principles of accountability exist, even if the precise details of liability vary from jurisdiction to jurisdiction. The International Federation for Human Rights has also published a guidebook on corporate accountability for human rights abuses, which demonstrates that domestic legal principles, especially in Europe and the United States, allow for the imposition of civil liability on corporations for their participation in human rights abuses. *See* Int'l Comm'n of Jurists, Business and Human Rights - Access to Justice: Country Reports *available at* http://www.icj.org/default.asp?nodeID=350&langage=

1&myPage=Publications (discussing corporate accountability in representative jurisdictions). *See generally* Int'l Comm'n of Jurists, REPORT OF THE EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES (2008).

The FAFO Institute for Applied International Studies undertook a small but representative sampling of jurisdictions, limited to grave breaches of international law, and found overwhelming consistency in the principle that corporations could be liable for such violations, though the form of liability varied:

> The survey illustrates a potential web of liability created by the integration of [international criminal law/international humanitarian law] provisions to a wide range of domestic legal systems containing provisions for the prosecution of legal persons, including business entities, as well as extraterritoriality and universality provisions which extend jurisdiction abroad.

Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries* (FAFO 2006), available at http://www.fafo.no/pub/rapp/536/536.pdf (examining corporate liability in Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, Norway, the Netherlands, Spain, South Africa, Ukraine, the United Kingdom, and the United States).

In the light of this overwhelming evidence of general principles, the burden shifts to those arguing for corporate immunity from international law that the common denominator of corporate accountability

either does not exist, which is wrong as a matter of fact, or does not qualify as a general principle recognized by civilized nations, which is wrong as a matter of law.

Treaties

8. *Generally*. A diverse array of treaties reveals the international consensus that corporations can have international obligations, specified by treaty and implemented (as usual) through the various instrumentalities of domestic law. In other words, across time and across subject matters, treaties have defined acts or omissions for which international law imposes responsibility on individuals and for which punishment may be imposed, typically though not exclusively through national institutions. These particular treaty-based wrongs do not necessarily include state action as an element of the offence and do not apply exclusively to state actors. Nor do the legal regimes governing these wrongs distinguish between natural and juridical individuals in such a way as to immunize the latter from all responsibility.

9. *Treaty regimes explicitly barring corporate immunity*. A variety of treaties – dealing *inter alia* with terrorism, environmental protection, and bribery – incorporate the principle of corporate liability in criminal and non-criminal form (emphasis supplied in all cases):

- European Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005) ("Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish *the liability of legal entities* for participation in the offences

set forth in Articles 5 to 7 and 9 of this Convention.");

- Convention against Transnational Organized Crime, Nov. 15, 2000, art. 10(1), 2225 U.N.T.S. 209 ("Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish *the liability of legal persons* for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.");
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 2, S. Treaty Doc. No. 105-43 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish *the liability of legal persons* for the bribery of a foreign public official.");
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57;
- International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 3, 1973 art. I(2), 1015 U.N.T.S. 243 ("The States Parties to the present Convention *declare criminal those organizations, institutions, and individuals* committing the crime of apartheid.");
- International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3;
- Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251;

- Convention Concerning Occupational Safety and Health and the Working Environment, adopted June 22, 1981, at art. 16(1) ("Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.")

This diverse array of treaties, though hardly exhaustive, illustrates the accepted understanding within the international community that corporations have international obligations and are not in principle exempt from liability for violations of international law.

10. Human rights and humanitarian law treaties. Numerous human rights treaties also contemplate the responsibility of persons, natural and juridical, and do not require state action as an element of the wrong. In other words, these treaty regimes apply to private actors acting in purely private capacities:

- Article IV of the Genocide Convention, adopted Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045, requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Nothing in the text or the travaux preparatoires of the Genocide Convention suggests that the phrase "private individuals" refers exclusively to human beings, and it would be inconsistent with the remedial purpose of the Convention if the only type of entity exempt from its reach would be a juridical creation of the state itself.
- Certain aspects of the war crimes regime of the Geneva Conventions of 1949, especially

common Article 3, similarly bind non-state actors when they are parties to an armed conflict. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian persons in Time of War, adopted Aug. 12, 1949, 75 U.N.T.S. 287, 6

- U.S.T. 3516;
- The anti-slavery regime is similar in not requiring state action, and contemporary forms of slavery – like forced labor and child labor – are internationally wrongful whether committed by governments or non-state actors. *See, e.g.*, Slavery Convention of 1926, *adopted* Sept. 25, 1926, 60 L.N.T.S. 253; Convention Concerning Forced or Compulsory Labour, *adopted* June 28, 1930, 39 U.N.T.S. 55.
- The International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, confirms that the primacy of state responsibility in the human rights regime does not implicitly exempt "groups" and "persons" from human rights obligations. To the contrary, the Human Rights Committee, which oversees states' compliance with the International Covenant on Civil and Political Rights, has ruled that states must "redress the harm caused by such acts by private persons *or entities*." U.N. Human Rights Comm., Gen. Cmt. No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (emphasis supplied). Though phrased in terms of the obligation of governments to provide remedies, the Committee's statement would be nonsense-on-stilts if corporations were in principle exempt from the Covenant's standards altogether. Admittedly, some of the Covenant's norms require state action to be wrongful (*e.g.* torture), and others do not (*e.g.*

slavery), which means that the precise contours of a corporation's ICCPR liability – the settings in which such liability if any will be appropriate – must vary with the facts presented and the norm involved. But the pure position that corporations are beyond the reach of international law cannot be squared with the Committee's authoritative interpretation of the ICCPR itself.

- Similarly, the Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195, obliges States to remedy "any acts of racial discrimination," and the Race Committee, which was established under the Convention, has consistently ruled that this provision includes the acts of corporations. *Concluding Observations for the United States*, 2008, CERD/C/USA/CO/6, at ¶30.
- More indirect but still real obligations are imposed on private parties, including corporations, in virtually all of the arms limitation agreements, which oblige state parties to translate the international prohibitions into domestic law binding on the private sector. Thus for example, a corporation is not free to traffic in anti-personnel landmines in a country that is a party to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and Their Destruction, *adopted* Sept. 18, 1997, 2056 U.N.T.S. 241, 36 I.L.M. 1507, at art. 9:

> Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to

> prevent and suppress any activity prohibited to a State Party under this Convention undertaken by *persons* or on territory under its jurisdiction or control.

11. *Contextual wrongs*. Treaties also establish the potential liability of corporations for the wrongs they commit in the course of their relationships with a government, not just the wrongs that do not require state action as an element of the offence. There is no rule at international law that corporations, regardless of their relationship with a government, enjoy immunity from treaty-based norms when they engage in state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons. As noted by the Special Representative to the U.N. Secretary-General in his summary of international legal principles as applicable to business enterprises, the corporate responsibility to respect human rights includes avoiding complicity, which has been most clearly elucidated "in the area of aiding and abetting international crimes, *i.e.* knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime...." John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (7 April 2008), at ¶ 74. Thus, whether the corporation commits one of the wrongs that do not require state action or is enmeshed with the State itself in the commission of treaty violations that do require state action, the companies potentially face liability under treaty regimes.

Custom

12. *Proving the content of customary international law.* In identifying the three offenses that gave rise to liability under the traditional law of nations when the ATS was enacted, the *Sosa* Court relied on the traditional evidence used to establish the content of international law in U.S. courts:

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the *customs and usages of civilized nations*; and, as evidence of these, to the works of jurists and commentators.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis supplied). In practice, the U.S. courts, in determining the content of custom, have turned to "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states...." AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT (THIRD)"), § 102(2), comment b at 25. Widely ratified treaties, or a series of treaties in consistent form, may also constitute evidence of customary law in both domestic courts, *Filártiga*, *supra*, and in the International Court of Justice, *Nottebohm Case (Liech. v. Guat)*, Second Phase, 1955 I.C.J. Rep. 4, 21-23. Evidentiary weight may be given to resolutions of international organizations, such as the United Nations or the Organization of American States, the decisions of international and national courts and arbitral tribunals, as well as the opinions of prominent scholars, not because they are binding in themselves but because they can qualify as evidence of customary international law, *i.e.*, uniform state

practice combined with *opinio juris*. In short, courts with ATS cases are obliged to be "vigilant doorkeep[ers]" according to Justice Souter in *Sosa*, but the standards for vigilance have been the law of the United States for decades, if not centuries.

13. *History of entity liability at customary international law.* Customary international law has long recognized the authority of domestic courts to enforce claims against non-human and non-state entities for violations of the law of nations. Under the law maritime (an ancient and specialized subspecies of customary international law), ships – like modern corporations – were the entities through which business owners and managers engaged in commercial transactions across borders. The exposure of these nonhuman entities to liability under international standards was routinely recognized through the instrument of civil in rem jurisdiction or its equivalent. For example, in the United States as in other jurisdictions around the world, the international violation of piracy was enforced not only against the individual pirate but against the vessel he used. In other words, legal responsibility for this archetypal violation of customary international law was not limited to natural persons. "The vessel which commit[ted] the aggression [wa]s treated as the offender" and was subject to forfeiture. *Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210, 233 (1844). In *The Marianna Flora*, the Supreme Court, per Justice Story, concluded on the basis of international law that "piratical aggression by an armed vessel . . . may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. (11 Wheat.) 1, 40-41 (1825). Similarly, in *The Palmyra*, the Court clarified that *"[t]he thing is here primarily considered the offender*,

or rather the offence is attached primarily to the thing." 25 U.S. (12 Wheat.) 1, 14 (1827) (emphasis supplied). In *The Little Charles*, 26 F. Cas. 979, 982 (No. 15,612) (C.C. Va. 1818) (emphasis supplied), Chief Justice Marshall, sitting on circuit, explained that "it is *a proceeding against the vessel*, for an offence committed by the vessel."

Pirates were not the only ones whose "entities" faced sanction under international legal standards: one routine way to enforce the international prohibition on the slave trade was to condemn the vessel involved. *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law,* 117 YALE L. J. 550 (2008), at 590-591. In addition to whatever sanctions may have been imposed on the people involved, international law was enforced against the entities involved in the violation. Crucially, no treaty established the right or the obligation of the United States courts to enforce international law in this way. It was instead a right and obligation of the state under the law of nations.

14. *Entity liability under customary international law after World War II.* Over time, the applicable international law broadened from the prohibition of piracy and slave trading to include international humanitarian law. After World War II, the human beings that managed the world's largest chemical company – I.G. Farben – were placed on trial at Nuremberg, but the corporations through which they committed their crimes were at no point immunized from responsibility. To the contrary, the corporations were sanctioned out of existence before the trials even began, as effectively "seized" as ships engaged in piracy or the slave trade. The legal basis for this

administrative action lay initially in Article 9 of the London Charter, which provided in part:

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

Agreement for the Prosecution and Punishment of the Major War criminals of the European Axis, *adopted* August 8, 1945, 82 U.N.T.S. 279, 58 Stat. 1544. There was no doubt that the term "person" covered both human beings and juridical entities. Under Control Council Law No. 5, Vesting and Marshalling of German External Sources (Oct. 30, 1945), reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, available at http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf:

> the term "person" shall include any natural person or collective person or any juridical person or entity under public or private law having legal capacity to acquire, use, control or dispose of property or interests therein.

In Control Council Law No. 9, adopted even before the Tribunal was established, the occupation authority explicitly dissolved Farben and seized its assets:

> All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized and the legal title thereto is vested in the Control Council.

Article I, Control Council Law No. 9, Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof (Nov. 30, 1945), reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, available at http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

Nor was Farben the only corporation that was held accountable for Nazi crimes. Insurance companies were directly dissolved and their assets liquidated. Alfried Krupp was sentenced to 12 years imprisonment and ordered to forfeit all his property, but the Krupp business – central to many of the Nazi regime's crimes – was confiscated. In other words, the failure to prosecute corporations criminally creates no immunity from civil or administrative liability for international wrongs. Responsibility under international law can be established in ways having nothing to do with criminal prosecution.

Even in the course of finding individual human beings guilty of international crimes, the Nuremberg tribunals established that juridical entities were bound by customary international standards, including those codified in the Hague Regulations on the Laws and Customs of War of 1907:

> where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [Article 47 of] the Hague Regulations.... The result was the enrichment of Farben and the building of its greater chemical empire

> through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War....[T]he objective of pillage, plunder and spoliation stands out, and there can be no uncertainty as to the actual result. ... With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries....

United States v. Krauch (*The I.G. Farben Case*) VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1131-32, 1140-41 (1952).

Although the tribunal may have lacked the jurisdiction to impose criminal sanctions on corporations, it could not have been clearer that customary international law applied to corporations engaged in egregious violations of humanitarian norms and that they could be held accountable for it. In our own time, an even broader range of customary international humanitarian law has been extended to business enterprises. The International Committee of the Red Cross – by consensus the authoritative interpreter of IHL obligations – has increasingly addressed the complex relationships between state and non-state actors in times of armed conflict and developed principles that do not recognize some broad-

gauged exemption for companies. *See* International Committee of the Red Cross, Business and International Humanitarian Law: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW, *Publication Ref. 0882* (2006).

15. *Contemporary custom: the practice of intergovernmental organizations.* It is now common for intergovernmental organizations to address the human rights responsibilities of multinational corporations, even if they have historically failed to adopt a comprehensive code of conduct for companies. For example, in June 2011, the Human Rights Council of the United Nations approved three Guiding Principles proposed by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. These principles include (1) the duty of the state to protect against human rights abuses by, or involving, transnational corporations and other business enterprises; (2) the corporate responsibility to respect all human rights: and (3) the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms. United Nations Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/RES/17/4 (6 July 2011). Then in November 2011, the United Nations described the Guiding Principles as "the global standard of practice that is now expected of all governments *and businesses* with regard to business and human rights." THE CORPORATE RESPONSIBILITY TO PROTECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (November 2011), at 3 (emphasis supplied). The Interpretive Guide makes it clear that the Guiding Principles, though not legally obligatory themselves, offer an authoritative

elaboration on "*existing* standards and practices for States *and businesses*." *Id* (emphasis supplied). Non-binding interpretations of existing international law by the UN or its agencies can qualify as evidence of custom. *Compare, I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 439 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979).")

The United Nations is not the only intergovernmental organization to articulate and implement the human rights responsibilities of corporations. The Organization for Economic Cooperation and Development ("OECD"), through its National Contact Points process, now routinely receives and processes complaints that specific corporations have acted inconsistently with the OECD's Guidelines for Multinational Enterprises. OECD, Specific Instances Considered by National Contact Points (22 November 2011). *See also* OECD, POLICY BRIEF: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A KEY CORPORATE RESPONSIBILITY INSTRUMENT (2003), available at http://www.oecd.org/dataoecd/52/38/2958609.pdf. In Paragraph 1, those Guidelines specifically emphasize the duty of business enterprises to respect the human rights of those affected by their activities. With respect to the human rights of workers, the Declaration on Fundamental Principles and Rights at Work, adopted in 1998 by the International Labour Organization ("ILO"), requires all ILO Member States to implement and enforce the principles contained in the eight so-called "core conventions," each of which governs employment relationships in the private sphere.

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Board of the International Labour Organization (1977), reprinted in 37 *Int'l Leg.Mats.* 1233 (1998). The ILO instrument is especially significant given the inclusion of corporate representatives in the organization's tripartite governing structure. The law of the European Union can also create obligations for business entities, as established repeatedly by the European Court of Justice. *See, e.g.*, Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405; Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455.

Taken together, these authorities establish at a minimum that customary international law does not recognize, preserve, or allow an international law-free zone for corporations.

16. *The impact of the International Criminal Court.* The scope of corporate liability under customary international law is not altered by the Rome Statute, which established the International Criminal Court ("ICC"). By its terms the Rome Statute cannot displace or even revise customary international law. To the contrary, the Rome Statute explicitly precludes its use to "limit[] or prejudice[e] *in any way* existing or developing rules of international law *for purposes other than this Statute*." Rome Statute, at art. 10 (emphasis supplied). In other words, the *lex specialis* governing the ICC reflects a highly specialized, carefully negotiated, and intentionally circumscribed body of principles, which cannot and do not alter the general practice of states and *opinio juris* as catalogued and applied by the *ad hoc* criminal tribunals and summarized above.

It is true that corporations cannot be defendants in the ICC, just as most nations in the world confine criminal sanctions to natural rather than juristic individuals. But in a case like this one – where the civil liability of companies is at issue and not their exposure to criminal proceedings in the ICC – the decision of the ICC negotiators to prosecute human beings exclusively is irrelevant. The civil liability of corporations is so well-established among domestic legal systems around the world that it qualifies as a "general principle of law," which qualifies as a source of international law no less than treaties or custom, as shown above.

17. *The impact of the ILCASR.* The United Nations International Law Commission's Articles on State Responsibility ("Articles" or "ILCASR") do not undermine the conclusion that international law – in the form of treaties, custom, and general principles – recognizes the possibility of corporate liability; indeed, the ILCASR are not directly relevant to the issue of corporate responsibility at all. As the title suggests, these Articles, drafted by scholars and jurists in their private capacities rather than by government representatives, offer principles governing the responsibility of *states* for internationally wrongful acts. They were never intended to and do not offer a comprehensive and exclusive restatement of all forms of responsibility under international law. As shown above, for example, it is well-established that individuals, whether acting under color of authority or not, can be liable for violations of international law, as for example if they commit acts of piracy, slave trading, or genocide. But these and the other examples of individual responsibility are explicitly *not* the subject of the ILCASR. It follows that the Articles can offer no guidance on the essential question at this

stage in this litigation, namely whether international law distinguishes in principle between natural and juridical persons on the question of liability generally.

V. Conclusion

18. In *Sosa,* the Supreme Court reaffirmed the practice of ATS courts which had imposed liability under the statute "for the modest number of international law violations with a potential for *personal* liability." 124 S.Ct. at 2761 (emphasis supplied). International law in all its forms fully supports the proposition that the "person" facing liability can in principle be either natural or juridical. As a consequence, the burden rests on those who would carve out some special immunity under the ATS for one kind of "person" and not the other. Nothing in international law authorizes or justifies so rigid a distinction.

Respectfully submitted,

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Date: 8 July 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case Number: CV 06-3869

JOSEPH JESNER, et al.,

Plaintiffs,

v.

ARAB BANK, PLC,

Defendant.

DECLARATION OF RUTH WEDGWOOD

I, Ruth Wedgwood, declare as follows:

1. I have been asked to give my opinion on a specialized question of international law in relation to the 1789 Alien Tort Statute, codified at 28 U.S.C. § 1350. The question put is whether there is a well-established principle of liability in international law (also known as the law of nations) for deliberate corporate complicity in acts of terrorist financing, aiding and abetting crimes against humanity, and aiding and abetting acts of genocide.

2. The instant opinion is intended to assist the Court in analyzing the legal sufficiency of pending claims against defendant Arab Bank PLC, a Jordanian Bank that has operated in the United States, for alleged deliberate complicity in terrorist bombings mounted to kill and wound civilians in Israel and the Middle East. Arab Bank PLC allegedly aided and abetted these terrorist acts of extraordinary

violence by paying and transmitting rewards to the families of suicide bombers, using specially numbered bank accounts, and knowing that such payments were rewards for suicide bombings.

3. The May 24, 2013 motion to dismiss the claims in this case was filed subsequent to the decision of the U.S. Supreme Court in Kiobel v. Royal Dutch Petroleum Co., __U.S.__, issued on April 17, 2013.

4. It is my conclusion that (a) the financing of acts of terrorism constitutes a tort, under applicable treaties and customary international law, and (b) the corporate identity of the actor does not grant any immunity or exemption from the principle of liability well established in international law. Hence, the case is cognizable under the Alien Tort Statute.

QUALIFICATIONS AND EXPERIENCE

5. I offer this opinion solely in my personal capacity. For identification purposes only, I have been employed since September 11, 2001 on the faculty of the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Washington, D.C., specializing in scholarship and graduate instruction on public international law, the law of armed conflict, international criminal law, international arbitration, international human rights law, United Nations politics and law, and the U.S. Constitution and foreign affairs power. I hold the Edward Burling Chair of International Law and Diplomacy and serve as Director of the Program on International Law and Organizations.

6. I have previously served as the Co-Director of Studies of the Hague Academy of International

Law in the Netherlands, as the Charles Stockton Professor of International Law at the U.S. Naval War College, Newport, Rhode Island, and as Professor of Law at Yale University. From 2003-2011, I served by appointment of the Secretary of Defense as a member of the Pentagon's "Defense Policy Board," charged with the task of rendering advice to the Secretary on issues of long-term defense strategy, counterterrorism, and the conduct of ongoing operations by U.S. armed forces. I have also served on the U.S. Department of State Advisory Committees on Public and Private International Law, and serve on the editorial boards of the American Journal of International Law, the Journal of Strategic Studies, and the "Prism" journal of the National Defense University.

7. During my academic career, I have chaired the Council on International Affairs of the Association of the Bar of the City of New York, as well as the ABCNY Committee on Arms Control and International Security Affairs, and have served as Vice President of the American Society of International Law. I currently serve as Counselor of the ASIL and as president of the U.S. chapter of the London-based International Law Association. Earlier in my professional career, I served as an Assistant United States Attorney in the Southern District of New York, prosecuting cases of Soviet espionage against the United States, the smuggling of controlled military components to North Korea and the Soviet Union, and the domestic terrorism of the Weather Underground. In addition, I served as a federal law clerk to Judge Henry J. Friendly of the U.S. Court of Appeals for

the Second Circuit and Justice Harry Blackmun of the United States Supreme Court.

8. Apart from my scholarly work at Yale and Johns Hopkins SAIS, I became practically familiar with United Nations operations, politics and treaties during my tenure as adjunct senior fellow and director of the Council on Foreign Relations' Project on International Law and Organizations from 1993-2001, convening a "diplomatic roundtable" of high-level United Nations ambassadors and officials to discuss peacekeeping challenges in places such as Bosnia, Rwanda, and East Timor and legal issues such as the financing of international terrorism. Together with former Time magazine editor-in-chief Henry Grunwald, I co-chaired the first Council on Foreign Relations' Congressional briefing series on "Lessons Learned in Peacekeeping." I was also asked by the U.S. Secretary of State to serve as the U.S. member of the United Nations Human Rights Committee from 2003-2011 in Geneva and New York.

INTRODUCTION

9. The purpose of this declaration is to make available to the Court pertinent precedents and practice in international law, including archival material that might otherwise not be familiar or readily available.

10. The question at issue is whether international law prohibits the financing of terrorism, genocide, and crimes against humanity, and whether liability for such crimes and torts . can extend to acts of aiding and abetting by a corporate or institutional actor.

11. The immediate occasion for this question is the instant law suit seeking damages from Arab Bank

PLC for allegedly transmitting payments to the families of suicide bombers in numbered accounts following acts of terrorism, as part of an incentive scheme to induce and facilitate such acts.

12. The suit is brought under the Alien Tort Statute, creating federal court jurisdiction for actions in damages for "torts" under the law of nations or a treaty of the United States. See 28 U.S.C. § 1350. This jurisdictional statute was part of the 1789 Judiciary Act passed by the first American Congress, and provides that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

13. International legal norms can derive both from treaty law and from binding custom (also known as customary international law or the law of nations). A State must specifically agree to an international treaty in order to be bound by its norms. By contrast, customary international law can arise from the widespread practice of states and an accompanying sense of obligation ("opinio juris"), even without any specific written text. When a customary norm is in formation, a dissenting state would have to publicly opt out as a "persistent objector" to avoid its obligations.

14. There is a third category of binding norms in international law that does not depend on a particular state's decision to "opt in" or "opt out"" This is known as "jus cogens" – i.e., cogent and compelling law – comprised of a limited set of well-established and morally compelling taboos, including the modem prohibitions against genocide, slavery, and torture. States are legally

bound by "jus cogens" norms regardless of their preference.

15. The particular terms used to translate an international norm into local civil and criminal law may vary from one country to another. In the civil law systems of Germany and France, for example, the common law's distinction between "negligent" versus "intentional" misbehavior is captured instead in the ideas of the mental states of "dolus eventualis" or foreseeable harm, and "dolus specialis" or deliberate intent. Nonetheless, a difference in labels does not preclude the existence of identical core ideas.

16. There are various international torts and crimes that are defined and prohibited by widely accepted international treaties. These include the 1948 Genocide Convention and a host of U.N. conventions on the varied forms of terrorism – including terrorism consisting of crimes aboard aircraft, aircraft hijacking, deliberate attacks on diplomats, hostage-taking, attacks on offshore maritime platforms, terrorist bombings, and nuclear terrorism.

17. A key treaty immediately pertinent to this case is the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229. This pact was framed in the 1990's because of grave concern in the United Nations community about the rise of global fundraising networks that fueled acts of local and international terrorism, by seeking voluntary contributions from expatriate communities and also extorting funds from vulnerable diaspora families whose members lived in conflict zones. One immediate impetus for the drafting of the

Terrorist Financing Convention at the United Nations was the brutalizing terrorism that occurred in Sri Lanka over the course of several decades - when a Tamil secessionist group known as the LTTE (or "Liberation Tigers of Tamil Eelam") tried to claim territory in the north of the island for an independent Tamil state, with acts that included the 1991 assassination of Indian Prime Minister Rajiv Gandhi and the 1997 truck bombing of the World Trade Center in the capital city of Colombo. But since its inception, the terrorist financing convention has been deployed against the financing of acts of terror in many other conflicts, including the financing of acts of Islamic terrorism.

18. The Alien Tort Statute, 28 U.S.C. § 1350, enacted in the first Judiciary Act of the new American republic in 1789, creates federal court jurisdiction to hear actions by alien plaintiffs for torts committed in violation of "the law of nations" as well as torts that violate any "treaty to which the United States is a party." The "law of nations" was the phrase commonly used by the Founders of the American Republic to refer to customary international law.

19. These two bases for ATS jurisdiction are not always separate and distinct, for a widely-accepted international treaty can contribute to the rapid "crystallization" of new customary law rules that will be binding even on non-signatory states – as noted by the International Court of Justice in the 1969 North Sea Continental Shelf cases and acknowledged by the United States in its diplomatic practice. For the text of the ICJ opinion, *see North Sea Continental Shelf, Germany*

v. Denmark, Germany v. Netherlands, 1969 I.C.J. 3 (Feb. 20), also available at http://www.icj-cij.orgldocket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=.

20. The scope of the Alien Tort Statute, as framed by the first Congress, thus allows civil suits in federal court to be based on the norms of a treaty ratified by the United States or, in the alternative, upon binding rules of customary law, including the mandatory rules of "jus cogens."

21. For ATS jurisdiction, there is no requirement that a treaty or customary rule should have explicitly referenced a mode of judicial enforcement – rather, the norm is made actionable by the provisions of the Alien Tort Statute itself.

22. So, too, there is no requirement that the same norm be justiciable in the courts of a partner country. Each state party to a treaty remains responsible for assuring that the treaty's requirements are met, including by regulating the conduct of its own citizens, but the modality of enforcement is the choice of each state.

THE KIOBEL DECISION AND THE CORPORATE FINANCING OF TERRORISM AS BOTH A CRIME AND TORT

23. The application of the Alien Tort Statute to overseas torts was addressed in the recent term of the U.S. Supreme Court in the signal case of *Esther Kiobel et al* v. *Royal Dutch Petroleum Co.*, 569 U.S. __ (April 17, 2013).

24. The decision of the majority, with an opinion written by Chief Justice John Roberts, notes that there is a general "presumption against extraterritorial application" of U.S. statutes and

concludes that the Alien Tort Statute must be applied with a similar presumption against extraterritoriality. This is so, notes the Chief Justice, even though the substantive rule of decision in each ATS case itself derives from the law of nations. *See Kiobel v. Royal Dutch Petroleum*, slip opinion, at page 14.

25. *Kiobel* is an important landmark decision – but it also must be read with some attention to the facts of the case and the specific rules of international law that were in issue. The case concerned the alleged misconduct of the Nigerian military in policing the oil delta on the coast of Nigeria, known as "Ogoniland" – and the alleged responsibility of a Netherlands company, Royal Dutch Shell PLC, in "providing . . . food, transportation, and compensation" to Nigerian armed forces in the area, as well as "allowing the Nigerian military to use respondents' property as a staging ground for attacks." rd. at page 2.

26. This is a scenario that has been the subject of various ATS cases in a number of other settings, including allegations concerning the role of the Indonesian army in protecting Exxon Mobil's critical energy installations in Aceh, Indonesia, against armed attacks by the "GAM" insurgency during the rebellion mounted in that province (a conflict now resolved through a largely successful peace agreement); and the role of the Sudanese armed forces in protecting the installations of Talisman Energy Inc. in southern Sudan (a conflict now largely resolved by the independence gained by the new state of South Sudan).

27. The facts before the Supreme Court in the *Kiobel* case lacked any involvement of an American

corporation or a direct policy interest of the United States. It was a so-called **"foreign cubed"** case, as the locution puts it – involving the alleged misconduct of a foreign corporation on foreign territory in regard to foreign victims.

28. The presumption against extraterritoriality unsurprisingly finds its strongest footing in a classic "foreign cubed" case such as *Kiobel*, where it may also be noted that

    (a) There was **no self-executing treaty** to which the United States was a party that regulated the alleged misconduct.

    (b) There was **no action taken by the United Nations Security Council, nor any binding resolution taken under the powers of Chapter 7 of the U.N. Charter** in regard to the situation. The Security Council is entitled to take binding "decisions" in any situation where it finds a threat to international peace and security, and these "decisions" are mandatory for all member states of the United Nations under Articles 25, 39, and 103 of the U.N. Charter. Of course, by the terms of the Charter, any proposed Security Council resolution is subject to veto by any of the five permanent members of the Security Council (the United States, the United Kingdom, France, Russia, and China). There was no pertinent Security Council resolution in the case of Nigeria and Royal Dutch Shell's alleged misbehavior.

    (c) There was **no statute of the United States** that sought to address such extraterritorial disputes involving non-U.S. actors.

(d) Even the **Torture Victims Protection Act,** Pub. L. No. 102-256, 106 Stat. 73 (1992), passed by Congress in 1992 – and authorizing any U.S. citizen or alien to sue foreign individuals in U. S. federal court for torture occurring overseas – did not supply a cause of action against foreign entities, including a foreign company, because the Congress chose the word "individual" as opposed to "person" in describing permissible defendants. *See Mohamad v. Palestinian Authority*, U.S. Supreme Court, No. 11-88 (2012).

29. But the instant case now before the District Court involves a **wholly different legal landscape,** concerning the critical issue that has been front and center in the United Nations Security Council, the Sixth Committee of the United Nations General Assembly, the U.S. Congress, and the U.S. Treasury Department – namely, **the urgent need to quell the sources of financing that fuel international terrorism.**

30. The United States has championed a comprehensive United Nations treaty, now boasting 182 states parties, to combat the financing of international terrorism. In this treaty – the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 *(entered into force* Apr. 10, 2002), terrorist financiers are specifically condemned not as mere "aiders and abettors" of terrorist acts, but as culpable principal actors guilty of the heinous act of terrorist financing.

31. Whether the malefactor is a natural person or a corporate entity, the U.N. Terrorism Financing Convention requires that participating states

investigate and proceed against any actor who "provides or ***collects funds*** with the intention that they should be used . . . to carry out" any terrorist action, or ***"in the knowledge* that they are to be used, in full or in part"** to carry out such an act. (Emphasis added).

32. This prohibition extends to the financing of any terrorist act noted in other U.N. treaties (see paragraph 37 *infra).* In addition, as a free-standing prohibition, the treaty bars financing "[a]ny other act intended to cause death or serious bodily injury to a civilian" or "any other person not taking an active part in the hostilities in a situation of armed conflict" when the "purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

33. Centrally important to the instant case, each of the 182 signatory states to the Terrorist Financing Convention undertakes to take "necessary measures" against any legal entity – whether ***"located in its territory"*** or *"organized under its laws"* – for forbidden acts of terrorist financing.[1]

34. Thus, the application of the Alien Tort Statute to the activities of a bank or other institution that

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[1] *See* Convention for the Suppression of the Financing of Terrorism, supra, at article 5(1): "Each State Party, in accordance with its domestic legal principles, shall take the necessary measures ***to enable a legal entity located in its territory or organized under its laws to be held liable*** *when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 1. Such liability may be criminal, civil or administrative*" (emphasis added).

has knowingly facilitated a program of terrorist bombings is consistent with American law and U.S. treaty obligations.

35. Corporate entities doing business in the United States and that are engaged in the knowing distribution of financial rewards to the families of suicide bombers are in violation of international law, and the United States is entitled and indeed obligated to provide a remedy against them. It is consistent with U.S. foreign policy and international law to find that the Alien Tort Statute permits suits in damages against financial institutions "located" in the United States which provide or knowingly facilitate financial rewards for acts of suicide bombings.

36. Such a construction of the Alien Tort Statute is also consistent with the counter-terrorism policy of the United States and its leadership role in the Sixth Committee of the U.N. General Assembly in regard to drafting, promoting and enforcing these key treaty instruments.

37. The counter-terrorism treaties that have been promoted and championed by the United States as part of a bipartisan foreign policy include (in chronological order): the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941 *(entered into force* Dec. 4, 1969); the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641 *(entered into force* Oct. 14, 1971); the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 1641 *(entered into force* Jan. 26, 1973); the Convention on the Prevention and Punishment of Crimes Against

Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 *(entered into force* Feb. 20, 1977); the International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 *(entered into force* June 3, 1983); the Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980,14-56 U.N.T.S. 101 *(entered into force* Feb. 8, 1987); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, March 10, 1988, 1678 U.N.T.S. 304 *(entered into force* Mar. 1, 1992); the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474 *(entered into force* Aug. 6, 1989); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 *(entered into force* Mar. 1, 1992); the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359 *(entered into force* June 21, 1998); the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. *284 (entered into force* May 23, 2001); the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 *(entered into force* Apr. 10, 2002); the International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2149 U.N.T.S. 256 *(entered into force* July 7, 2007); the 2005 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the

Safety of Maritime Navigation, Oct. 14, 2005 *(entered into force* July 28, 2010), available at: <http://www.state.gov/t/isnitrty/81727.htm>; the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Sept. 10, 2010, available at 50 International Legal Materials 144 (2011), (not yet in force); and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Sept. 10, 2010, available at 50 International Legal Materials 153 (2011) (not yet in force).

38. So, too, over the last 20 years, the United States has led a counter-terrorism campaign in the United Nations Security Council designed to thwart the financing of terrorism. Strict financial sanctions were put in place against the Taliban by U.N. Security Council Resolution 1267, U.N. Doc, S/RES/1267 (Oct. 15, 1999), and all States have been required to freeze the financial resources belonging to the Taliban, including "any undertaking owned or controlled by the Taliban." An administrative committee – the so-called "1267 Committee" – was established under the authority of the Security Council and still operates to monitor and interrupt financial flows to the Taliban.

39. Designated businesses, charities, and organizations, as well as individuals, can be placed under this regime of asset freeze, upon nomination of members of the Security Council, though there is a new administrative method for reexamining cases where the factual circumstances have been challenged. The real party in interest is the focus of scrutiny. Thus, for example, the corporate form of a Taliban-controlled business would not be

sufficient to exempt it from counter-terrorism sanctions.

40. Following the deadly bombing of the U.S.S. Cole in Aden, Yemen, on October 12, 2000, the U.N. sanctions regime was strengthened by U.N. Security Council Resolution 1333, instructing all States to "freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [1267] Committee, including those in the Al-Qaida organization." S.C. Res. 1333, para. 8(c), U.N. Doc. SIRES/1333 (Dec. 19, 2000). As this illustrates, taking action against "entities" that help to fund terrorism was seen as a central U.S. policy objective.

41. And finally, after the dreadful attacks of September 11, 2001, the Security Council met on September 28, 2001 and unanimously approved a resolution, adopted under Chapter VII of the U.N. Charter, mandating that all States should act to "[p]revent and suppress the financing of terrorist acts." *See* S.C. Res. 1373, para. l(a), U.N. Doc. S/RESI1373. Resolution 1373 directed all States to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice . . . ." *See* S.C. Res. 1373, para. 2(e).

42. The U.N. Security Council's committed framework of counter-terrorism resolutions, with its extraordinary effort to shut down terrorist financing, is enough to put to rest the old and misapplied canard that "One man's terrorist is another man's freedom fighter." There are certain heinous acts, including deliberate armed attacks

against civilians, which are terrorist acts, no matter what the motive of the actor. The universal nature of this prohibition, and its ratification under the United Nations Charter, establishes beyond peradventure that any deliberate financing of such acts is in violation of international law.

43. When the Alien Tort Statute was drafted as a framework jurisdictional statute in 1789, it is fair to say that the Founding Fathers could not have anticipated the particular challenges that the United States would face two centuries later. But the Founding Fathers were indeed familiar with an early form of terrorism – namely hostage-taking by the Barbary pirates, which confronted sailors from the West in the course of neutral shipping. It is faithful to that core history to employ the 1789 Alien Tort Statute against any business that knowingly facilitates other acts of international terrorism.

THE KIOBEL DECISION AND THE AIDING AND ABETTING OF CRIMES AGAINST HUMANITY

44. The widespread recognition of "crimes against humanity" as a new international crime was a development in international law provoked by the hideous violence of World War Two and the Holocaust. The core idea was found in the Hague Conventions of 1899 and 1909, in the so-called Martens Clause – which warned the rulers and armies of Europe that there were certain fundamental principles of decency that must be respected in warfare even if there was no specific prohibition in the lattice-work of battlefield rules.

The category functioned, in a sense, like the Ninth Amendment to the American Constitution, warning that the failure to specify a prohibitory rule did not mean that a heinous act was permitted.

45. The charge of "crimes against humanity" became, of course, one of the signal charges in the Nuremberg trials against the surviving Nazi leadership, and was defined in the Charter of the Nuremberg War Crimes Tribunal to encompass acts of "Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

46. In 1950, the United Nations International Law Commission also adopted a set of Principles established by the Nuremberg Tribunal, and included as Principle 3, the prohibition against "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime." *See* Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, 1950, vol. II, para. 7.

47. Since that time, the category of "crimes against humanity" has been incorporated by the U.N.

Security Council in the framework statutes of the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, and has been broadly used in the criminal prosecutions of those two tribunals. It has also been included in the Rome Statute of the International Criminal Court as a core crime.

48. In the international law of armed conflict – and in international criminal law generally – anyone who knowingly assists in the commission of a crime partakes of the culpability of the principal actor.

49. As a consequence, any individual, group or organization that wittingly sponsors or funds the commission of acts that constitute a crime against humanity would face possible liability for a tort against the law of nations. The Alien Tort Statute thus has prima facie application to such an occurrence.

THE KIOBEL DECISION AND THE AIDING AND ABETTING OF ACTS OF GENOCIDE

50. The complaint filed against Arab Bank in this case also alleges that the Bank's witting transmittal of "reward" payments to the families of the suicide bombers who detonated their bombs against Israeli civilians, in addition to providing extensive financial services to the leadership of the organizations that dispatched these bombers, amounted to the aiding and abetting of genocidal acts.

51. Certainly, the provision of these financial payments and services was hardly "routine" – especially since the leadership of the Arab Bank was headquartered in Jordan and was keenly

aware of the nature and motivation of the suicide bombing campaigns mounted by regional terrorist groups against Israeli civilians and civilian facilities.

52. Though the crime of genocide requires specific intent, the provision of assistance to a genocidal actor – while knowing that actor's intent and purpose – may itself suffice to constitute aiding and abetting genocide.

53. To use a grotesque example from World War II, if a commercial supplier had sold poison gas to the Nazi regime – while fully realizing that its intended use was to exterminate Jews and prisoners of war – the supplier might be found guilty of aiding and abetting genocide as well as aiding and abetting crimes against humanity, even if he was indifferent to the fate of both groups.

54. It is pertinent to recall three key provisions of the Genocide Convention, a treaty to which the Kingdom of Jordan has been a party since 1950. (The Convention entered into force on January 12, 1951.)

55. Article 3 of the Convention states that "complicity in genocide" must be made punishable as a criminal offense. Article 4 of the Convention states that participants in any of the prohibited acts – including complicity in genocide – "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." And article 7 of the Convention states that genocide and "complicity in genocide" shall "not be considered as political crimes" exempt from extradition.

56. And at its core, in Article 2, the Convention defines genocide as comprised of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

57. Under Article 2, the prohibited acts include "Killing members of the group," or "Causing serious bodily or mental harm to members of the group," or "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

58. Perhaps it is a signal of how far we have come, that one can conceive of punishing or penalizing a genocidal act without waiting for the widespread destruction of a people. That is consistent with the premise and text of the 1948 Genocide Convention. The 1948 Convention is, in fact, a treaty that the Kingdom of Jordan, domicile of the Arab Bank, has adopted and accepted as a matter of international law. It is also a treat commitment of the United States.

59. Thus, there is a firm basis to conclude that a campaign of suicide bombing – and its instigation by the knowing transmission of financial rewards to the families of the "successful" bombers – should be actionable under the Alien Tort Statute.

60. Even with a presumption against extraterritorial application of the ATS, the financing of suicide bombings is a matter that "touches and concerns" the United States – and all more so when the financial institution taking part is located within America's borders.

Dated: July 8, 2013

Ruth Wedgwood
Ruth Wedgwood

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case Number: CV 06-3869

JOSEPH JESNER, et al.,

Plaintiffs,

v.

ARAB BANK, PLC,

Defendant.

DECLARATION OF JENNIFER M. GREEN AND MICHAEL J. BAZYLER

We, Jennifer M. Green, and Michael J. Bazyler, do hereby declare as follows:

I. Statement of Qualifications

Jennifer M. Green is an Associate Professor and Director of the Human Rights Litigation and Advocacy Clinic at the University of Minnesota Law School. Previously she taught in the International Women's Human Rights Law Clinic at the City University of New York and was the Administrative Director and clinic project supervisor at the Harvard Law School Human Rights Program. She received her law degree from Harvard Law School in 1991. She is the author of numerous publications on the use of customary international law in United States courts and prosecuting human rights violators in international tribunals such as the international criminal tribunals for the former Yugoslavia and Rwanda and the Inter-American human rights system. One particular focus

of her scholarship has been legal access to remedies for international human rights violations, including those committed by corporations. One recent publication is *Nuremberg-era Jurisprudence Redux: The Supreme Court in* Kiobel v. Royal Dutch Petroleum Co. *and the Legal Legacy of Nuremberg*, 7 CHARLESTON LAW REVIEW (Fall 2012) (Supreme Court Review edition) (with Michael J. Bazyler). She served as counsel of record for amicus curiae briefs related to this article submitted to the Supreme Court, and the U.S. Courts of Appeal for the Seventh, Ninth and D.C. Circuits. These briefs were cited by the Seventh and D.C. circuits.[1] She has also testified before U.S. Congressional committees on human rights issues and has litigated human rights cases in U.S. courts and submitted briefs and made other interventions in the international human rights system; some of those cases and interventions are discussed below. Her curriculum vitae is attached as Exhibit A.

Michael J. Bazyler is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law in Orange, California. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at the United States Holocaust Memorial Museum in Washington, D.C. and Yad Vashem in Jerusalem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), where he was the holder of the Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism and the Holocaust. He is the author of two books, and various book chapters and law journal

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[1] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 51-52 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

articles on the relationship of law and the Holocaust, including *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press, 2003), *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (New York University Press, 2003) (with Roger Alford) and the forthcoming *The Holocaust, Genocide and the Law* (Oxford University Press) and *Forgotten Trials of the Holocaust* (New York University Press) (with Frank Tuerkheimer). He was a lead organizer of the conference held in Nuremberg in 2005 to commemorate the 60th Anniversary of the Nuremberg Trials and a parallel conference held at Cardozo Law School, and is presently organizing the conference to be held in 2015 to commemorate the 70th Anniversary of the Nuremberg Trials. He has testified before the U.S. Congress on issues dealing with law and the Holocaust and has litigated human rights cases in U.S. courts; some of those cases and interventions are discussed below. His curriculum vitae is attached as Exhibit B.

II. Introduction

1. As preparation for writing this declaration, we have reviewed the May 24, 2013 Memorandum of Law in Support of Defendant Arab Bank PLC's Motion to Dismiss Claims Asserted by Plaintiffs Pursuant to the Alien Tort Statute ("Def. Mem.").

2. In this memorandum, Defendant cites a 2-1 majority opinion in *Kiobel v. Royal Dutch* for the holding that "customary international law steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal

has ever held a corporation liable for a violation of the law of nations."[2]

3. We write this declaration to address Defendant's errors in relying on the section of the *Kiobel v. Royal Dutch* majority that discussed the legacy of Nuremberg-era jurisprudence (NEJ) pertaining to corporate liability for violations of international law.

4. The question of corporate liability was neither presented by the court nor briefed by the parties before the Second Circuit, and this may explain an incomplete analysis of NEJ by the *Kiobel* majority.

5. Specifically, the *Kiobel* majority opinion spoke only to one part of NEJ: case law decisions issued by the international criminal tribunals at Nuremberg that were established by the Allied occupying government after surrender of Nazi Germany in 1945. The opinion failed to consider an entire other part of NEJ: international laws enacted by the Allied occupying government that dealt specifically with legal persons such as organizations and corporations. Using these decrees, the same Allied occupying government that established the international criminal tribunals took action under international law to punish German corporations. An examination of this part of NEJ shows that corporations were punished under international law. The *Kiobel* majority's sole focus on the post-war criminal trials ignores the extensive legal framework under international law established by the Allies to

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[2] Memorandum of Law in Support of Defendant Arab Bank PLC's Motion to Dismiss Claims Asserted by Plaintiffs Pursuant to the Alien Tort Statute (May 24, 2013) (Def. Mem.) at 5, citing *Kiobel v. Royal Dutch*, 621 F.3d 111, 117-118 (2d Cir. 2010).

dismantle German corporations, seize their assets, and dedicate some of those assets to reparations.

6. The District of Columbia Circuit, the Seventh Circuit, and the Ninth Circuit, which did consider this framework, found that Allied actions dismantling German corporations and redistributing their assets under international law were actions taken under international law.[3] The D.C. Circuit specified that this practice of nations was a primary source of international law as opposed to decisions of international tribunals which are a secondary source of international law.

7. As we discuss in detail below, consideration of the parameters of customary international law (Section III), the complete historical context (Sections IV-VI) and the content of international laws enacted by the Allies in occupied Germany to address war crimes by juridical as well as natural persons lead to the conclusion that NEJ stands for the principle that international law provides for liability for organizations (Section VII) and corporations (Section VIII) when they violate international law. Section VII provides a more complete analysis of the specific Allied law on organizations that the *Kiobel* majority did not consider in its analysis and Section VIII details the laws which addressed particular corporations or industrial sectors.

8. To conclude that NEJ provides immunity to corporations under international law is a grave misreading of NEJ.

III. Sources of Customary International Law

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[3] *Doe v. Exxon*, 654 F.3d 11; *Flomo v. Firestone*, 643 F.3d 1013; *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 758 (9th Cir. 2011)

9. Customary international law norms are those that are the "customs and usages of civilized nations."[4]

10. The U.S. Supreme Court has held that customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by he general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[5] In 2004, the Court endorsed this standard in *Sosa v. Alvarez-Machain*:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[6]

11. Article 38 of the Statute of the International Court of Justice states that the Court will determine international law by applying:

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[4] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

[5] *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

[6] *Sosa*, 542 U.S. at 734 (citing *Paquete Habana*, 175 U.S. at 700).

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.[7]

12. The Restatement (Third) of Foreign Relations Law of the United States lists the following categories of sources of customary international law:

> [1] [V]irtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights;
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> [2] the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa;
>
> [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law;
>
> [4] action by States to conform their national law or practice to standards or principles declared by international bodies . . . [and]

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[7] Statute of the International Court of Justice art. 38, Jun 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993; *quoted in Filartiga v. Pena-Irala*, 630 F.2d 876, 881 n. 8 (2d Cir. 1980).

[5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions, and other diplomatic communications.[8]

13. Customary international law is to be found in the "practice of states,"[9] which also encompasses activities such as their external conduct with each other, domestic legislation, diplomatic dispatches, internal government memoranda, and ministerial statements.[10]

14. Judicial decisions are only a secondary source of customary international law, while the practice of states is primary evidence of that law.[11] Thus, to evaluate the customary international law applicable to corporations that emerged from the post-World War II period, it would be error to rely only on Nuremberg *judicial* actions, while ignoring the large body of state practice by the Allies that demonstrated that corporations were not considered immune under international law. Or to put another way, international law is not made only in courtrooms -- or even primarily in courtrooms. Therefore, looking solely to judicial decisions for norms of international law is simply incorrect.

15. Applying this standard, the D.C. circuit held that the post-war actions against Nazi corporations

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[8] Restatement (Third) of Foreign Relations Law of the United States § 701, Reporters' Notes 2 (1987).

[9] Sir Robert Jennings & Sir Arthur Watts, 1 OPPENHEIM'S INTERNATIONAL LAW 25, 26 (9th ed. 1996).

[10] *Id.* at 26.

[11] *See* Statute of the International Court of Justice art. 38(d) (listing "judicial decisions" as a "subsidiary means for the determination of rules of international law).

were part of customary international law. In the majority opinion, Judge Judith Rogers highlighted the international law norms created by the Allied Control Council, the multinational body that the Allies established after their defeat of Nazi Germany to govern occupied Germany.[12] Specifically, Judge Rogers pointed to Allied Control Council Law No. 9, dismantling I.G. Farben:

> [T]he corporate death penalty enforced against I.G. Farben was as much an application of customary international law, on which Control Council Law No. 9 was based, as the sentences imposed by the tribunals themselves: the Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it.[13]

16. The D.C. Circuit in *Exxon* also cited to the liquidation of other companies pursuant to Control Council Laws Nos. 39, 47, and 57.[14] The D.C. Circuit expanded its analysis by rejecting defendant Exxon's "implicit" suggestion "that because the Nuremberg era did not produce tribunal decisions embodying disapprobation of corporate atrocities, corporate liability under the law of nations cannot exist or be ascertained."[15] The court then noted that under the doctrine on the sources of international law, the conduct of nations is primary evidence of international

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[12] *Doe v. Exxon*, 654 F.3d at 31.

[13] *Id.* at 51-52.

[14] *Id.* at 52 n.42.

[15] *Id.*

norms, while judicial decisions are merely secondary evidence.[16]

17. The D.C. Circuit also noted that at the time of the prosecutions of the industrialists at Nuremberg before the NMT, I.G. Farben had already ceased to exist, and so the Allied prosecutors' decision not to charge Farben did not reflect a view that I.G. Farben had not committed violations of international law – or that Farben and other German corporations were immune from liability.[17] Quoting the Farben decision itself and commentary by former U.S. War Crimes Ambassador David Scheffer, the D.C. Circuit noted:

> The only way that the Nuremberg prosecutors made their cases against the corporate executives of Farben and Krupp was to establish that these corporations had violated international law." [Ambassador Scheffer] concludes: "The *Kiobel* majority's contention that corporations cannot violate international law thus flies in the face of common sense, logic, and the reality of the evidence presented at Nuremberg."[18]

18. Similarly, three days after the *Exxon* decision, the Seventh Circuit issued a unanimous decision that agreed with the D.C. Circuit that corporations could be sued for international law violations under the ATS. In a case against the Firestone corporation for

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[16] *Id.* (citing Statute of the International Court of Justice art. 38(1)(a); JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (8th ed. 1854); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 23 (2006)).

[17] *Id.*

[18] *Id.* at 53 n.43 (internal citations omitted).

human rights violations in Liberia, the Seventh Circuit, in an opinion by Judge Richard Posner, stated:

> The factual premise of the majority opinion in the *Kiobel* case is incorrect.[19] At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law.[20]

19. Allied actions after the war against organizations and corporations both reflected pre-existing customary international law and contributed to the development of this law.

IV. Program Enacted by the Allies Upon the Occupation of Germany

20. To properly analyze the application of NEJ to corporations, it is necessary first to understand the broad program enacted by the Allies after the occupation of Germany.

21. The Allies' program to govern occupied Germany for the period immediately following the cessation of hostilities contained three components: (1)

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[19] *Id.* at 1017 (citing Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted* in 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 131 (1945), *available at* http://www.loc.gov/rr/frd/Military_Law/enactments-home.html; Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225, http://www.loc.gov/rr/frd/Military_Law/enactments-home.html).

[20] *Id.*

what to do with the German state upon defeat of the Third Reich; (2) what to do with natural persons and organizations who committed crimes; and (3) what to do with the German economy and its corporations.

22. With regard to the defeated German Reich, the Allies first occupied the country by dividing it into four zones, and, later, as a consequence of the Cold War, into two states: the Federal Republic of Germany, created out of the Western zones, and the German Democratic Republic, created out of the Soviet zone. With regard to the natural persons and organizations, the outline of what to do with the Reich leaders and other perpetrators of "atrocities, massacres and executions" was first set out in the Moscow Declaration of November 1, 1943,[21] while the war was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[22] The Moscow Declaration left open the decision of what to do with the Reich

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[21] "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in...atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries.... German criminals whose offenses have no particular geographical localization...will be punished by joint decision of the government of the Allies." Statement of Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, Moscow, November 1, 1943, 3 Bevans 816, 834 Dep't St. Bull. (Nov. 6, 1943).

[22] Charter of the Int'l Mil. Trib. at Nuremberg – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945).

leaders (including Hitler) until the conclusion of hostilities, and the London Charter codified the decision of the Allies to try the so-called major war criminals (now without Hitler, who committed suicide) before an international military tribunal constituted at Nuremberg. The third issue that faced the Allies upon Nazi Germany's defeat was what to do with the major German corporations that had participated in war crimes and other violations of international law.

23. The *Kiobel* majority did not incorporate this complete history into their analysis of whether international law provided for liability for violations by both organizations and corporations. The disbanding of Nazi organizations and German corporations – as well as the convictions of Nazi organizations at the Nuremberg trials – were all acts taken under international law.

V. The Allies Were Acting Pursuant to International Law

24. Another point for which there is no dispute is that post-war Germany was under Allied occupation, one of the well-accepted areas of international law, although there is some debate over the precise form of occupation law that governed. A debate in legal scholarship that has continued to the present centers around whether the customary international law principle of *debellatio* – the law governing complete conquest – was in effect in occupied Germany after unconditional surrender,[23] or whether the Allies were

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[23] *See, e.g.*, EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 91-96 (2004); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 33 (2009); KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 113-20 (2011). The NMT in The

governing according to the customary international law of occupation, as codified in the 1907 Hague Regulations.[24] The common denominators, however, were that the Allies controlled the area they conquered under the international law of occupation and that, whether acting inside or outside the various courtroom in occupied Germany, they aimed to make their actions conform to international law.

25. Even before the war had ended, the Allies began negotiating the parameters of the postwar legal framework through the European Advisory Commission (EAC).[25] This included punishment for past acts of aggression and other war crimes and an effort to deter in the future such crimes through the dismantling of the German war machine.[26]

26. Prior to the London Charter, there was no international tribunal authorized to prosecute persons

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Ministries Case, 14 TRIALS OF WAR CRIMINALS BEFORE THE MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 690 (1946-1949), and The Justice Case, 3 TRIALS OF WAR CRIMINALS BEFORE THE MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 960–62, concluded that the customary international law principle of *debellatio* was in effect after Germany's surrender.

[24] *See, e.g.*, Convention Regarding the Laws and Customs of War on Land, *annexed to* Convention Respecting the Laws and Customs of Land Warfare, art. 46, Oct. 18, 1907, 36 STAT. 2277, *available at* 2 AM. J. INT'L. L. 1, 112-13 (Supp. 1908) (Article 43 required that the laws of the occupied country be respected unless the occupier was "absolutely prevented" from doing so).

[25] HAJO HOLBORN, AMERICAN MILITARY GOVERNMENT: ITS ORGANIZATIONS AND POLICIES 22 (1947).

[26] *Id.* at 26.

for international crimes.[27] The London Charter created the International Military Tribunal (IMT) to try persons and set out the specific international crimes for which these so-called "major war criminals" would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

27. No pre-war international treaty defined these crimes (save for war crimes) or made particular persons responsible for committing them. As a result, the Allies turned to customary international law. They did so in order to avoid the problem of *nulla crimen sine lege* (no crime without a law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. As Justice Robert Jackson, the chief Nuremberg prosecutor wrote in his Final Report to President Truman:

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a

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[27] Even though the Allied Powers contemplated putting Kaiser Wilhelm II on trial and included such a provision in the Versailles Treaty, such a trial never took place and an international tribunal was never constituted, although much-criticized trials were held pursuant to German law. Gary JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 59-60 (2000).

> war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.[28]

28. After the war, the victorious Allies also established a legal framework to punish and dismantle the corporations that made the Nazi war of aggression possible and that were so deeply involved in the most shocking Nazi atrocities. They dissolved these corporations; seized their assets and used them to compensate some of those injured during the war; and forced the wholesale reconfiguration of the German economic structure.

29. The principal international documents setting forth the post-war framework were the February 1945 Yalta Accord and the August 1945 Potsdam Agreement. These two agreements laid out a multinational framework for action which included dissolution of Germany's industrial assets, public and private, and creating a system of reparations for states and persons injured during the Nazi period.

30. At Yalta, the Joint Report issued by Churchill, Roosevelt and Stalin stated that:

It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the

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[28] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 342 (U.S. Dep't of State, Pub. No. 3080, 1949), *available at* http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/finalreport-to-the-president.pdf. *See also Nuremburg Judgment*, 6 F.R.D. 69, 108-10 (1947) (longstanding recognition that international law imposes duties and liabilities upon persons as well as upon states).

world. We are determined to . . . eliminate or control all German industry that could be used for military production; bring all war criminals to just and swift punishment and exact reparation in kind for the destruction wrought by Germans . . . ."[29]

31. The other central document setting forth the postwar legal structure, the Potsdam Agreement, stated that the "purposes of the occupation of Germany by which the Control Council shall be guided are the complete disarmament and demilitarization of Germany . . . to dissolve all Nazi institutions and to prepare for the eventual reconstruction of German political life . . . and for eventual peaceful cooperation in international life by Germany."[30] With regard to German corporations, the Potsdam Agreement specified: "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements."[31] The two related objectives of the program were the elimination of

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[29] Joint Report on Results of the Anglo-Soviet-American Conference (Crimea, 1945) (Winston Churchill, Franklin D. Roosevelt, J. Stalin, Feb. 11, 1945), *Crimea Conference Communiqué* (Feb. 2-11, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 2, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf (Crimea Conference).

[30] Protocol of the Proceedings of the Berlin (Potsdam) Conference, U.S.-U.K.-U.S.S.R., Aug. 2, 1945, 3 Bevans 1207, 1220, *available at* http://avalon.law.yale.edu/20th_century/decade17.asp (Potsdam Agreement). § II.A.3 at 1481-82.

[31] *Id.*, § II.B.12.

Germany's war potential[32] and the payment of reparations.[33]

In order to eliminate Germany's war potential, the production of arms, ammunition and implements of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented. Production of metals, chemicals, machinery and other items that are directly necessary to a war economy shall be rigidly controlled and restricted to Germany's approved post-war peacetime needs to meet the objectives stated in Paragraph 15. Productive capacity not needed for permitted production shall be removed in accordance with the reparations plan recommended by the Allied Commission on Reparations and approved by the Governments concerned or if not removed shall be destroyed.[34]

32. The Allied plan for post-war Germany was known as the "de" program, usually identified as demilitarization, decartelization, denazification and democratization.[35] The program originated in the Potsdam Agreement, which stated: "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements."[36]

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[32] *Id.*, § II.B.11, II.B.19.

[33] *Id.*, § II.B.19.

[34] *Id.*, § II.B.11.

[35] DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 25 (2001).

[36] Potsdam Agreement, § II.B.12.

33. As a central component of this program, corporations faced demilitarization, deconcentration, and decartelization, as the Allies sought the elimination or control of all German industry that could be used for military production, with, as stated above, the related objectives of the elimination of German's war potential and the payment of reparations.[37]

VI. Legal Structure

34. Evidence of the application of international law is shown through a carefully crafted international legal structure for the occupation, including a hierarchy of legal documents and related and coordinated bodies including the Allied Control Council, the Allied High Commission, and various committees and directorates with delineated responsibilities over the Allied zones and industrial sectors.

35. The mandate of the quadripartite Control Council was to translate the Allies' policies into law.[38]

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[37] *Id.*, § II.B.11.

[38] *See* Agreement on CONTROL MACHINERY IN GERMANY, NOV. 14, 1944, *reprinted in* STAFF OF S. COMM. ON FOREIGN RELATIONS, 80TH CONG., DOCUMENTS OF GERMANY, 1944-1959: Background Documents on Germany, 1944-1959, and A CHRONOLOGY OF POLITICAL DEVELOPMENTS AFFECTING BERLIN, 1945-1956, *available at* images.library.wise.edu/History/EFacs/GerRecon/BackrndDocs/reference/history.backgrnddocs.i0001.pdf; Eli E. Nobleman, *Quadripartite Military Government Organization and Operations in Germany*, 41 AM. J. INT'L. L. 650, 651-52 (1947) (stating that the supreme governing machinery for Germany is the Allied Control Authority (ACA), composed of the Control Council, the Coordinating Committee, the Control Staff and the Allied Secretariat). The Control Council was composed of Commanders-in-Chief of the Armed Forces of the United States, United Kingdom, Union of Soviet Socialist Republics, and France,

As stated above, the Control Council was charged with the "inflexible purpose" to "destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world."[39] To meet that goal, the Control Council was instructed to "[e]liminate or control all German industry that could be used for military production; bring all war criminals to justice and swift punishment and exact reparation in kind for the destruction wrought by Germans."[40] Its authority to confiscate property and provide for reparations, necessarily emanated from international law and not from local German law.

36. Under the Control Council was the Coordinating Committee, which was assisted by ten directorates serving as functional specialists for the Coordinating Committee, including the Finance Directorate, Legal Directorate, Reparation Directorate, and Restitutions Directorate.[41] The Control Council and Coordinating Committee were provided with the "means of legislative action," including laws "on matters of general application," orders to communicate Control Council requirements, and directives used to "communicate policy or administrative decisions of the Control Council."[42]

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and acted "on instructions from their respective governments with respect to all matters affecting Germany as a whole." *Id.* at 651.

[39] Crimea Conference, *supra* note 29.

[40] Crimea Conference, *Id.*

[41] Nobleman, *supra*, note 38, at 651-52.

[42] Control Council Directive No. 10, *Control Council Methods of Legislative Action* (Sept. 2, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 95 (1946), *available at* http://www.loc.

37. In 1949, the three-power Allied High Commission replaced the four-power Control Council for the Western occupied zones, and the Federal Republic of Germany began to be created out of the Western zones. Related laws, sometimes known as "zonal legislation," were also issued for the Federal Republic of Germany in the different Western Allied zones still under partial occupation.

VII. The Allies Applied International Law to Organizations

38. One of the starting points for the *Kiobel* majority is the London Charter that established the IMT court, but even here the majority did not consider the entirety of that document nor its historical context.

39. A complete reading of the London Charter shows that it specified that groups or organizations could violate international law when the Charter authorized the IMT to designate any group or organization as criminal: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."[43]

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gov/rr/frd/Military_Law/Enactments/law-index.pdf. Control Council Directive No. 51, which replaced Control Council Directive No. 10, states that "the only legislative acts which may contain penalty clauses are laws and orders." Control Council Directive 51, *Legislative and Other Acts of the Control Council* (Apr. 29, 1947), *reprinted in* 7 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 27, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdfindex.pdf.

[43] London Charter, art. 9.

40. At the IMT trial,[44] the tribunal noted the significance of the London Charter:

> The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.[45]

41. The Allied Control Council, charged with implementing the agreement made in the London Charter, furthered the work of the IMT by enacting Control Council Law No. 10 on December 20, 1945, exactly one month after the trial of the major war criminals had begun.[46] Under Control Council Law No. 10, each of the Allies could conduct their own international law trials in zones they occupied by following the explicit international law now set out in the London Charter.

42. The entire point of the IMT and the subsequent Nuremberg Military Tribunals (NMT) held by the Americans pursuant to Control Council Law No. 10 was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich. The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons -

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[44] The Nurnberg Trial 1946, 6 F.R.D. 69 (1946).

[45] *Id.* at 107.

[46] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf

- regardless of their official positions -- could be held responsible for state crimes under international law. As Justice Jackson noted in his Opening Address to the IMT: "The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. . . ."[47] This emphasis on personal as opposed to state liability also contrasted with the view, ultimately reached by the Allied Powers after the First World War, only to hold states responsible under international law. In their amicus curiae brief to the Supreme Court, the United States State and Justice Departments stated:

> The International Military Tribunal's statement that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced," see Pet. App. A12, A50 (quoting The Nuremberg Trial (*United States* v. *Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)), has been taken out of context. The Tribunal clearly was rejecting the defendant's argument that only a state could be held liable for violations of international law; it was not making any

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[47] Trial of the Major War Criminals Before the International Military Tribunal 98-155 (1947) ("the Blue Set") *available at* http://avalon.law.yale.edu/subject_menus/imt.asp).

distinction among actors other than the state.[48]

43. The IMT prosecutors, in addition to the 22 people in the dock, also indicted six Nazi organizations: the Reich Cabinet, the *Sturmabteilungen* (SA), the German High Command, the Leadership Corps of the Nazi Party, the *Schutzstaffeln* (SS) with the *Sicherheitsdienst* (SD) as its integral part, and – separately – the Geheime Staatspolizei (Gestapo). The Nuremberg judges acquitted the first three organizations and designated the last three as criminal.

44. In addition to the condemnation by the international tribunals, Nazi organizations were subjected to other action by the Control Council. In fact, by the time these organizations were declared to be criminal by the IMT, they had been punished under international law because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.

45. What is critical is that the Allies carried out this punishment under international law. It was an international treaty that dissolved the Nazi Party and its related entities on September 20, 1945 (following the London Charter on August 8, 1945 and before the IMT trial began on November 20, 1945).[49] This death

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[48] Brief for the United States as Amicus Curiae Supporting Petitioners at 30, *Kiobel*, 132 S. Ct. 1738 (No. 10-1491) (U.S. DoS and DoJ Brief).

[49] Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French

by dissolution was confirmed by Control Council Law No. 2, which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets.[50]

46. Control Council Law No. 43 also made clear that organizations could be punished inside the courtroom:

> Any organization violating, or attempting to violate any of the provisions of this law or of any regulations hereunder shall be liable to prosecution before a Military Government Court and upon conviction shall be dissolved and its property confiscated by order of the Court."51[51]

47. NEJ, both inside and outside the courtroom, therefore establishes that juridical entities can be

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Republic on Certain Additional Requirements to Be Imposed on Germany Art. 38, (Sept. 20, 1945), *reprinted in* Supplement: Official Documents, 40 AM. J. INT'L L. 1, 29 (1946) ("The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal.").

[50] Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[51] Control Council Law No. 43: Prohibition of the Manufacture, Import, Export, Transport and Storage of War Materials, Art. VI (Dec. 20, 1946), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE, *available at* http://www.loc.gov/rr/frd/Military_Law/ Enactments/05LAW43.pdf.

liable for international law violations in addition to states and natural persons.

VIII. The Allies Applied International Law to Corporations

A. General Laws

48. Particularly revealing about the role of international law in the actions taken against corporations is the language of the laws themselves – from the repeated label, "Law No. xxx," to the content which included references to international documents such as the Potsdam Agreement, and the need to deter future threats against the "peace of the world," or the purpose of providing reparations "for the destruction wrought." Contemporary cases provided additional evidence of the common acceptance of corporate liability as a part of customary international law.[52]

49. The Allied laws were intended to encompass more than natural persons. Control Council Law No. 5 (CCL5) specifically defined "person" to include "collective" or "juridical" persons or entities.[53] CCL5,

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[52] *See* U.S. DoS and DoJ Brief, *supra* note 48, at 30 (German court in suit "apparently brought under German law held that '[t]he fundamental principles of equality, justice, and humanity must have been known to all civilized persons, and the [I.G. Farben chemical company in its current liquidated form] cannot evade its responsibility any more than can an individual").

[53] Control Council Law No. 5, *Vesting and Marshalling of German External Sources* (Oct. 30, 1945), *reprinted in* 1 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE, 176, 179 (1945), *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf ("[T]he term 'person' shall include any natural person or collective person or any juridical person or entity under public or private law having legal capacity to acquire, use, control or dispose of property or interests therein.").

echoing the language of Yalta and Potsdam, also discussed its overarching goal: to seize all German assets abroad "with the intention thereby of promoting international peace and collective security."[54]

50. The Control Council issued orders for the seizure of the assets of a wide range of German corporations, notably those producing arms, coal, steel and chemicals, and the banks and insurance companies that the Allies, after detailed investigations, found to be involved in the war of aggression.[55] Those companies were dissolved and their assets made available for reparations.[56] The language of these particular laws made clear their foundation in international law. For example, Control Council Directive 39 noted that "[t]he Potsdam decisions call for the liquidation of German war and industrial potential. . . ."[57] The principles to be followed in the "Rules for Liquidation" of war plants noted that buildings were to be "destroyed, [ ] declared available for reparations, or [ ] left for the peace-time economy

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[54] *Id.* at 176.

[55] *See* Control Council Directive No. 39, *Liquidation of German War and Industrial Potential* (Oct. 2, 1946), *reprinted in* 5 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1-6, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf; Control Council Directive No. 47, *Liquidation of German War Research Establishments* (Mar. 27, 1947), *reprinted in* 6 ENACTMENTS AND APPROVED PAPER OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 95-97, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume- VI. pdf.

[56] *See* Control Council Directive No. 39, *supra* note 5; Control Council Directive No. 47, *supra* note 55.

[57] *See* Control Council Directive No. 39, *supra* note 55, at 1.

in cases where they can be used for the peace-time economy. . . ."[58]

51. The laws enacted linked the elimination of concentrated economic power to the prevention of future violations of international law. Military Government Law No. 56 stated that it was enacted "in accordance with paragraph 12 of the Potsdam Agreement in order to (i) prevent Germany from endangering the safety of her neighbors or again constituting a threat to international peace . . . ."[59]

52. A series of laws also focused on the denazification of industries and specifically regulated who businesses could hire. For example, Control Council Law No. 8 (also enacted prior to Control Council Law No. 10), "with the aim of cleansing big business, . . . purged all Nazi Party members from supervisory or managerial posts in business."[60] Allied Military Government Law No. 8, stated, at Paragraph 1, "It shall be unlawful for any business enterprise to employ any member of the Nazi party or of its affiliate organizations in any supervisory or managerial capacity, or otherwise than in ordinary labor . . . ."[61]

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[58] *Id.* at 3.

[59] *Prohibition of Excessive Concentration of German Economic Power*, MILITARY GOVERNMENT GAZETTE (Feb. 12, 1947). Identical language was repeated in British Military Government Ordinance No. 78, 16 MILITARY GOVERNMENT GAZETTE 412 (Feb. 12, 1947).

[60] Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1147 (2009).

[61] Allied Military Government Law No. 8, *Prohibition of Employment of Members of Nazi Party in Positions in Business Other than Ordinary Labor and for Other Purposes*, MILITARY GOVERNMENT GAZETTE Sept. 26, 1945, *available at*

Law No. 8 also made compliance with this provision a necessary condition for a business to be permitted to open or operate.[62]

53. A series of laws was also enacted to deal with particular corporations or industrial sectors. Actions taken against these companies included disbanding them and distributing their assets as reparations, and were undertaken as a form of punishment for and deterrence of the international law violation of instigating a war of aggression.

B. Farben and Control Council Law No. 9 (1945)

54. The most well-known example of Allied action taken against a German corporation is the case of I.G. Farben, notorious for being critical both to the Nazi aggressive war effort and the system of slave labor and other atrocities that took place during the Nazi era.[63]

55. Farben knowingly supplied Zyklon B poison gas used in the German concentration camps to murder millions, conducted notorious medical experiments upon unwilling prisoners at Auschwitz, and operated a massive industrial complex next to Auschwitz that ruthlessly exploited over 25,000 inmates, most of whom died from hunger, disease, or exhaustion.[64]

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http://digicoll.library.wisc.edu/cgibin/History/Historyidx?type=div&did=History.Denazi.i0012&isize=M.

[62] *Id.*

[63] JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 1-2 (1978).

[64] *See id.* at 3-4, 133-39.

56. Farben also provided key assistance to the Nazi aggressive war campaign. As put by the Farben report issued by the Allies after the war: "Without I.G.'s immense productive facilities, its far-reaching research, varied technical experience and overall concentration of economic power, Germany would not have been in a position to start its aggressive war in September 1939."[65] The company also looted the chemical properties of countries conquered by the Nazis.[66]

57. Prior to the creation by the Control Council of the NMT under Control Council Law No. 10 on December 20, 1945, Farben was disbanded under Control Council Law No. 9 on November 30, 1945.[67] This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.[68]

58. Control Council Law No. 9 was based on the customary international law prohibition of crimes against peace that the Allies cited in the London Charter and used to prosecute Nazi leaders for waging aggressive war.[69]

59. The Preamble to Control Council Law No. 9, titled "Providing for the Seizure of Property Owned By

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[65] *Id.* at 1 (quoting Control Council Finance Division, Germany, *Report on Investigation of I.G. Farbenindustrie*, Sept. 12, 1945).

[66] *Id.* at 2.

[67] Control Council Law No. 9, *supra* note 19.

[68] *Id.*

[69] The Kellogg-Briand Pact made the planning and waging of aggressive war both illegal and criminal. Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 407–12 (1946); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 115 n.12 (1986).

I.G. Farbenindustrie and the Control Thereof," stated its clear purpose before ordering the dissolution of what was regarded as the Allies' principal economic enemy: "In order to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential . . . ."[70]

60. The punishment imposed by the Allied Control Council upon I.G. Farben was seizure.[71] Article I of Control Council Law No. 9 states: "All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized by and the legal title thereto is vested in the Control Council."[72]

61. Allied Military Government General Order No. 2 (Pursuant to Law No. 52: Blocking and Control of Property), which was to carry out the seizure of I.G.

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[70] Control Council Law No. 9, *supra* note 19, at 225; *see also* B. BERNSTEIN, OFFICE OF MILITARY GOVERNMENT, UNITED STATES (GERMANY), DIV. OF INVESTIGATION OF I.G. FARBENINDUSTRIE A.G. at i (1945), *available at* http://www.profit-overlife.org/pdf/books/report_on_the_investigation.pdf (describing a "program adopted by the Allied Powers at Potsdam to strip Germany of all of her external assets in the interest of future world security and to use such assets for the relief and rehabilitation of countries devastated by Germany in her attempt at world conquest. . . . [T]he primary purpose of the Allied Powers in acquiring all German holdings in other countries is to prevent their use by Germany in waging a third World War...").

[71] Control Council Law No. 9, *supra* note 19, at 225.

[72] *Id.*

Farben property in the U.S. Zone, specified that one of the purposes was reparations:

> 4. (a) In the exercise of such powers the Deputy Military Governor, or any person acting by or under his authority with respect to such property, shall be guided by the following specific objectives, and will take such measures as he deems appropriate to accomplish them: a) The making available to devastated non-enemy countries of Europe and to the United Nations, in accordance with such programs of relief, restitution and reparations as may be decided upon, of any of the property seized under this order and, in particular [lists a large amount of products and equipment].[73]

62. Following Control Council Law No. 9, the Allies also enacted a series of additional laws targeting Farben. For example, Allied Military Government Law No. 5 prohibited transaction of I.G. Farben stocks.[74] A 1950 directive regarding Farben emphasized that when acting against Farben the Allies saw themselves as an international body bound by law.[75] Article 2 of the directive specified that "[u]ntil the council of the Allied High Commission has otherwise decided, the British, French and United States I.G. Farben Control Officers shall continue to

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[73] Allied Military Government General Order No. 2, Blocking and Control of Property (June 1, 1946), reprinted in MILITARY GOVERNMENT GAZETTE June 1, 1946.

[74] Allied Military Government Law No. 5, *Prohibition of Transactions in Stocks and Bonds and Other Interests of I.G. Farbenindustrie A.G.* (Jan. 29, 1946), *reprinted in* MILITARY GOVERNMENT GAZETTE June 1, 1946.

[75] Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* (Aug. 17, 1950), *reprinted in* DOCUMENTS ON GERMANY UNDER OCCUPATION 1945-1954, 503 (1955).

exercise all rights and powers of seizure and control over the assets subject to this Law conferred by any Occupation Legislation."[76]

63. Between August 1947 and July 1948, the NMT in *United States v. Krauch* [Trial No. 6], put on trial twenty-four directors of Farben.[77] While the NMT was clear in *United States v. Krauch* that Farben was not before the court (and one obvious reason was because it had already been disbanded by Control Council Law No. 9, which was enacted before the creation of the NMT tribunals under Control Council Law No. 10), throughout the opinion the NMT discussed the corporation as an entity. The opinion summed up the wartime activities of Farben: "[I. G. Farben] used its expert technical knowledge and resources to plunder and exploit the chemical and related industries of Europe, to enrich itself from unlawful acquisitions, to strengthen the German war machine and to assure the subjugation of the conquered countries to the German economy."[78]

64. The trials of the industrialists undertaken by the Americans before the NMT and actions of the other Allied Control Council and related bodies against German industry demonstrate that actions taken as a part of corporate activity were seen as appropriate for criminal prosecution. Moreover, the NMT explicitly

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[76] *Id.* at 7.

[77] Records of the United States Nuremberg War Crimes Trials, United States v. Krauch (Case IV) (Aug. 14, 1947-July 30, 1948), *available at* http://www.profit-overlife.org/rolls.php?roll=1.

[78] U.N. War Crimes Comm'n, 10 LAW REPORTS OF TRIALS OF WAR CRIMES 4 (1949).

noted that corporations were legally responsible even though they were not before the court:

> [W]here *private individuals, including juristic persons,* proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified . . . , is in violation of international law. . . . Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law].[79]

65. Describing Farben's activities, the NMT wrote:

> We find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described. . . . The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.[80]

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[79] *Id.* at 44 (emphasis added).

[80] *Id.* at 49-50.

C. Allied Legal Action Against Krupp

66. The Krupp firm (Fried. Krupp A.G., Essen and successor Fried. Krupp. Essen) ("Krupp") was the largest manufacturer of large caliber armaments and warships and the second largest producer of iron and coal,[81] and as such one of the principal sources of supply for German armed forces.[82] Krupp allegedly subjected "over 55,000 foreign workers, over 18,000 prisoners of war and over 5,000 concentration camp inmates" to forced labor.[83]

67. Law No. 75, issued by the Office of the Military Government of the United States and the British zonal authorities, was directed at the coal, iron and steel industries.[84] This law set the framework for the re-distribution of shares of German heavy industry companies to their owners (after breaking the companies into smaller entities subject to Military Government Laws No. 52 and 56) and stated the punitive and deterrent intents: to prevent the "excessive concentration of economic power and . . . the return to positions of ownership and control of those persons who have been found or may be found to have

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[81] United States v. Krupp (The Krupp Case), 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 11 (1950), *available at* www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf.

[82] *Id.*

[83] *Id.* at 75.

[84] Allied High Comm'n Law No. 75, *On the Reorganization of German Coal and Iron and Steel Industries* (May 16, 1950), *reprinted in* 20 OFFICIAL GAZETTE OF THE ALLIED HIGH COMM'N OF GERMANY 299 (1973).

furthered the aggressive designs of the national Socialist Party."[85]

68. In 1950, Allied High Commission Law No. 27 replaced Military Government Law No. 75 in the three Western Zones and provided for the reorganization of German coal, iron, and steel industries with the goal of "preventing the development of a war potential . . . ."[86] Article 2 of Law No. 27 provided: "The enterprises listed or described in Schedule A shall be liquidated and reorganized with a view to the elimination of excessive concentrations of economic power which constitute a threat to international peace . . . ."[87] Examples of deconcentration pursuant to Law No. 27 were the actions taken against German heavy industry, including large iron and steel conglomerates such as Krupp.[88]

69. Allied Military Government Order No. 1 made clear that the disposition of "certain coal properties" was undertaken pursuant to international objectives,

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[85] United Kingdom and United States Military Government Law No. 75, *Reorganization of German Coal and Iron and Steel Industries* (May 16, 1950) *available at* http://www.cvce.eu/content/publication/1999/1/1/6148d81c-88f9-4afd-9f95-d2b626b9ed0b/publishable_en.pdf.

[86] Allied High Commission Law No. 27, *On the Reorganization of the German Coal and Steel Industries* (May 16, 1950), *reprinted in* 20 OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY 299 (May 20, 1950) (Allied Law No. 27); *see also* Allied Military Government General Order No. 7, *Iron and Steel Undertakings* (1946), *reprinted in* MILITARY GOVERNMENT GAZETTE Aug. 20, 1946.

[87] Allied Law No. 27, *supra* note 86.

[88] *See id.* at Schedule A; ISABEL WARNER, STEEL AND SOVEREIGNTY: THE DECONCENTRATION OF THE WEST GERMAN STEEL INDUSTRY, 1949-1954, 6-7 (1996).

"whereas, it is a basic objective of the United Nations that the German economy shall be decentralized for the purpose of eliminating excessive concentration of economic power . . . ."[89]

70. The Krupp firm was ordered dismantled by the Tribunal since Alfried Krupp, as the sole owner of Krupp, was sentenced to twelve years imprisonment and ordered to forfeit all his property under Control Council Law No. 10.[90] Legal action was also taken by the zonal authorities; the entire Krupp concern was confiscated pursuant to Military Government Law No. 52, and General Order No. 3.[91]

71. Similar to the Farben case, in the Krupp case the NMT examined the actions of the corporation itself, although the Krupp firm was not itself on trial:

> We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected: [sic] that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected: [sic] that the Krupp firm, through

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[89] Allied Military Government Order No. 1, *Providing for Disposition of Certain Coal Properties* (Oct. 1, 1947), *reprinted in* MILITARY GOVERNMENT GAZETTE, Oct. 31, 1947 (Krupp is one of the coal-distributing companies that the order applies to).

[90] The Krupp Case, *supra* note 81 at 1449-50.

[91] Allied Military Government General Order No. 3, *Firma Friedrich Krupp* (1946), *reprinted in* MILITARY GOVERNMENT GAZETTE, June 6, 1946.

> defendants . . . , voluntarily and without duress participated in these violations . . . and that there was no justification for such action.[92]

D. Allied Legal Action Against Deutsche and Dresdner Banks

72. The Potsdam Conference was central to the multilateral implementation of the "Potsdam postulate of decentralization" as it affected banks which were complicit in Nazi war crimes.[93] Two banks on which the Allies focused their investigations were the Deutsche Bank and the Dresdner Bank.[94] Both banks stole Jewish property by participating in the "Aryanization" process, i.e., the transfer of Jewish businesses and property to non-Jews.[95] For example, by November 1938, Deutsche Bank had participated in the "Aryanization" of over 300 Jewish businesses.[96] The bank also serviced accounts from the Gestapo, which deposited money obtained after auctioning

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[92] The Krupp Case, *supra* note 81.

[93] LOTHAR GALL ET AL., THE DEUTSCHE Bank 1870-1995, 406 (1995).

[94] OFFICE OF MILITARY GOVERNMENT (U.S.) REPORTS, WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK 39 (Christopher Simpson ed., 2002) (OMGUS Reports).

[95] HAROLD JAMES, THE NAZI DICTATORSHIP AND THE DEUTSCHE BANK 67-69 (2004); *See also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1230 (11th Cir. 2004); GALL, *supra* note 93; OMGUS Reports, *supra* note 94, at 39; JONATHAN STEINBERG, THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS (1999); HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF THE JEWISH-OWNED PROPERTY (2001) (report by historian hired by Deutche [sic] Bank to study its Nazi-era history).

[96] JAMES, THE NAZI DICTATORSHIP, *supra* note 95, at 68.

confiscated property from deported Jews. During the war, Deutsche Bank purchased more than 4.4 tons of gold from the Reichsbank, the German central bank. Included in the purchase was "744 kilograms [1,637] pounds of dental gold taken from Jews' teeth, wedding bands and personal property."[97] One of the most notorious examples of Deutsche Bank complicity in war crimes and crimes against humanity was the bank's financing of the construction of the Auschwitz concentration camp.[98]

73. As for Dresdner Bank, a 2,374-page, four-volume analysis of Dresdner's Nazi past, commissioned by the bank and issued in 2006 by independent historians, generally found that Dresdner Bank "built Nazi concentration camps, funded the SS and was intimately connected to the whole economic infrastructure of Hitler's Germany."[99] In Nazi-occupied lands, the saying went, 'Right after the first German tank comes Dr. Rasche from the Dresdner Bank'."[100] Dresdner Bank owned twenty six per cent of Huta the construction company that built portions of Auschwitz.[101]

74. A Liquidation Commission was set up after the war by the quadripartite Control Council; it required that the Dresdner Bank close roughly half of its

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[97] John Schmid, "Deutsche Bank Says It 'Regrets Nazi Deals," *Int'l. Herald Trib.*, August 1, 1998.

[98] MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 85 (2003).

[99] Patrick Jenkins, "Report Details Dresdner Bank's Nazi Past," *Fin. Times*, Feb. 17, 2006.

[100] Rafael Seligmann, "One of Germany's largest banks faces up to Nazi past," *Haaretz*, Feb.16, 2006.

[101] *Id.*

branches, including all branches east of the Oder-Neisse line.[102] Deutsche Bank was also broken into ten smaller units.[103]

E. Legal Action Against Insurance Companies

75. The German insurance companies provided essential support to the Nazi regime.[104] Allianz and other German insurance companies dismissed Jewish employees,[105] disposed of and acquired Jewish assets, participated in the expropriation of assets in the occupied territories, and insured businesses using forced and slave labor and the sites of the extermination camps.[106] Allianz insured the concentration camp factories.[107] Allianz gave money that was owed to Jewish beneficiaries from their life insurance policies to the Nazi authorities instead of to

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[102] *Dresdner Bank from 1872 to 2009*, COMMERZBANK, www.commerzbank.com/media/konzern/neue_commerzbank/marke/geschchte/dresdner_bank_history.pdf *See also* OMGUS Reports, *supra* note 94, at 255.

[103] HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY 232 (2001).

[104] Allianz was the largest insurance company in Germany when the Nazi party came to power. The extensive involvement of Allianz and its officers with the activities of the Third Reich is documented in GERALD D. FELDMAN, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945 (2001) (report by American historian hired by Allianz to study its Nazi-era history).

[105] *See, e.g.*, *id.* at 295. Company executives and even middle management were dismissed as part of the denazification process.

[106] *Id.* at 445.

[107] *Id.* at 535.

the beneficiaries.[108] The private insurance companies also acquired the insurance rights in Germany's occupied lands.[109]

76. The postwar military authorities, recognizing the role of the insurance companies, took measures against them. Control Council Law No. 57 provided for "Dissolution and Liquidation of Insurances Connected with the German Labour Front," a Nazi organization.[110] This law was enacted pursuant to Control Council Law No. 2, which targeted Nazi organizations. In addition to companies subject to Control Council Law No. 57, insurance companies such as Allianz, which were not considered directly part of the Nazi regime, were subject to denazification, and their respective assets were subject to seizure under Military Government Law No. 52.[111] The law "enabled occupation authorities to seize and control not only the property and assets of Nazis and their organizations but also property wrongfully taken or acquired by duress . . . ."[112]

IX. *Realpolitik* and the Cold War

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[108] *Id.* at 494.

[109] *Id.*

[110] Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), *reprinted in* 8 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 (1947), *available at* www.loc.gov/rr/frd/Military_Law/enactments-home.html.

[111] Military Government Law No. 52, *Blocking and Control of Property* (May 8, 1945), amended version *reprinted in* MILITARY GOVERNMENT Gazette at 24 (June 1, 1946). FELDMAN, *supra* note 104, at 497-98.

[112] *Id.* at 498.

77. Many of the actions taken to punish German individuals and German corporations by the Allied Control Council during the occupation were later undercut (or reversed) by the Western Powers as part of their campaign to make West Germany economically strong as a bulwark against further encroachment of Communism.[113]

78. However, the political decision made during the early years of the Cold War to avoid wiping out particular corporations or to allow those corporations to regroup in other forms does not negate the import of the many actions indicating a recognition that corporations had violated international law, and, under that law, could be held liable in multiple ways. As part of that same Cold War agenda, the Western Powers also commuted the sentences of many Nazi war criminals, including the German industrialists convicted at Nuremberg. However, such commutation does not take away from the principle that those industrialists convicted at Nuremberg committed crimes under international law.

79. The Allies, through their legislative bodies such as the Control Council, applied norms of liability through the laws and directives of the international community in occupied Germany by taking actions against natural persons (i.e., Control Council Law No. 10) and corporations (i.e., Control Council Law No. 9 and the other laws and directives cited above) and, through these actions, both incorporated and contributed to the development of international law.

X. Conclusion

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[113] BLOXHAM, *supra* note 35, at 163-169.

80. The complete legacy of NEJ should be analyzed when considering whether there is precedent under international law for corporations for violating that law.

81. Our conclusion, which concurs with the U.S. courts that have analyzed the question, is that NEJ provides that actions against natural persons, organizations, and corporations could be, and were, taken under international law.

We declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Jennifer M. Green
Jennifer M. Green

Executed in Minneapolis, MN on July 7, 2013.

Michael J. Bazyler
Michael J. Bazyler

Executed in Orange, CA on July 7, 2013

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 18 JUL 2008 200704313

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AMEMBASSY BEIRUT
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AMEMBASSY RABAT
DEPT OF TREASURY WASHDC

UNCLAS SECTION 01 OF 04 RIYADH 003538

STATE FOR NEA/RA, NEA/ARP, EB/ESC AND S/CT
TREASURY FOR OASIA/KIFAYAT, OGC/AUFHAUSER
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E.O. 12958: N/A
TAGS: RAID, ECON, EFIN, ETRD, SA

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SUBJECT: OFFICIAL SAUDI AID: A LONG TRADITION

REF: A. 00 RIYADH 953

B. RIYADH 3121

1. SUMMARY: DURING 1973-2000, OFFICIAL SAUDI AID REACHED $75.5 BILLION IN BILATERAL ASSISTANCE AND LOANS AND MORE THAN $20 BILLION IN CONTRIBUTIONS TO INTERNATIONAL LENDING INSTITUTIONS. ALTHOUGH SAUDI ARABIA HAS A LONG TRADITION OF GENEROUS GIVING, THE LEVEL OF SAUDI OFFICIAL AID HAS FALLEN STEADILY OVER TIME. SAUDI ARABIA ALLOCATED AN AVERAGE OF $2.4 BILLION FOR AID PER YEAR DURING 1985-1989. DURING 1990-1994 THAT FIGURE DROPPED TO $1.7 BILLION PER YEAR, A DECLINE OF 29%. MINISTRY OF FINANCE OFFICIALS TOLD ECONOFF THAT THE GOVERNMENT APPROVED $1.5 BILLION IN AID FOR 1999 AND $5 BILLION IN 2000. OFFICIAL AID IS CHANNELED THROUGH THE THE MINISTRY OF FINANCE, THE SAUDI FUND FOR DEVELOPMENT (SFD), AND THE MINISTRY OF FOREIGN AFFAIRS (MFA). SFD IS SAUDI ARABIA'S MAIN AGENCY FOR DEVELOPMENT ASSISTANCE WITH AN OPERATING CAPITAL OF APPROXIMATELY $8.2 BILLION. IN 2000, SFD SIGNED FIVE LOAN AGREEMENTS WITH MOROCCO, SENEGAL, LEBANON, KAZAKHSTAN, AND ALGERIA WORTH APPROXIMATELY $57 MILLION AND *HAS* CO-FINANCED TWO PROJECTS, ONE IN LEBANON FOR $11.7 MILLION AND THE

OTHER IN KAZAKHSTAN FOR $12 MILLION. TOTAL DISBURSEMENTS IN 2000 AMOUNTED TO APPROXIMATELY $75 MILLION TO FINANCE 46 PROJECTS IN 23 COUNTRIES. SAUDI ARABIA ALSO RAISES AID FUNDS THROUGH "NON-OFFICIAL" CHANNELS, INCLUDING TELETHONS, CHARITIES, AND SPECIAL "COMMITTEES" SET UP TO PROVIDE ASSISTANCE TO SPECIFIC COUNTRIES. END SUMMARY.

SAUDI AID STRONG BUT SHRINKING

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2. ACCORDING TO A MINISTRY OF FINANCE OFFICIAL, SAUDI AID FOR THE PERIOD 1973-2000, REACHED $75.5 BILLION IN BILATERAL ASSISTANCE AND LOANS AND MORE THAN $20 BILLION IN CONTRIBUTIONS TO INTERNATIONAL LENDING INSTITUTIONS SUCH AS THE WORLD BANK. SAUDI ARABIA'S OVERSEAS DEVELOPMENT AID (ODA) TO GNI RATIO AVERAGED JUST ABOVE 4% DURING THIS PERIOD. THIS IS WELL ABOVE THE UN RECOMMENDED RATE OF .7% OF ODA/GNI AND FAR OUTPACES THE OECD'S DAC MEMBER COUNTRIES AVERAGE OF AROUND .4% FOR 2000-2001. SAUDI ANNUAL ASSISTANCE LEVELS HAVE BEEN DECLINING. ACCORDING TO THE MINISTRY OF FINANCE, SAUDI ARABIA ALLOCATED $12 BILLION IN AID, OR AN AVERAGE OF $2.4 BILLION PER YEAR DURING THE PERIOD 1985-1989. FROM 1990-1994 THAT FIGURE DROPPED TO $8.5 BILLION, OR AN AVERAGE OF $1.7 BILLION PER YEAR, A DECLINE OF 29%. MINISTRY OF FINANCE

OFFICIALS TOLD ECONOFF THAT THE GOVERNMENT APPROVED $1.5 BILLION IN AID FOR 1999 AND $.5 BILLION IN 2000. (NOTE: FIGURES FOR 2001 HAVE NOT YET BEEN RELEASED.) THIS REPRESENTS A DECLINE OF SLIGHTLY MORE THAN 90% WHEN COMPARED TO THE 1981 FIGURE OF $5.5 BILLION. THERE ARE MANY REASONS FOR THE DECLINE IN AID ALLOCATIONS, INCLUDING FALLING OIL REVENUES, COSTS RELATED TO THE GULF WAR, AND A DOMESTIC ECONOMY UNABLE TO KEEP PACE WITH A GROWING POPULATION.

OFFICIAL AID CHANNELS

3. OFFICIAL SAUDI AID IS DISTRIBUTED IN THE FORM OF GRANTS AND NON-REFUNDABLE AID, CONCESSIONAL LOANS TO GOVERNMENTS, CONTRIBUTIONS TO INTERNATIONAL ORGANIZATIONS (E.G., THE WORLD

FOOD PROGRAM (WFP) OR THE WORLD HEALTH ORGANIZATION (WHO)), AND THROUGH INTERNATIONAL AND REGIONAL FINANCIAL DEVELOPMENT INSTITUTIONS (E.G., THE WORLD BANK, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD), OR THE ISLAMIC DEVELOPMENT BANK (IDE)). THIS AID IS CHANNELED THROUGH THE MINISTRY OF FINANCE, THE SAUDI FUND FOR DEVELOPMENT (SFD), AND THE MINISTRY OF FOREIGN AFFAIRS (MFA). THE MFA IS PRINCIPALLY INVOLVED IN THE FOREIGN POLICY ASPECT OF INTERNATIONAL AID AND MAY BECOME INVOLVED IN EMERGENCY ASSISTANCE. FOR EXAMPLE, IN THE CASE OF A NATURAL

DISASTER OR INCIDENT REQUIRING URGENT HUMANITARIAN RELIEF, THE MFA WILL SOLICIT THE VIEWS OF THE SAUDI EMBASSY IN THAT COUNTRY, PRESENT THOSE VIEWS TO THE FOREIGN MINISTER WHO WILL THEN CONVENE A MEETING OF THE COUNCIL OF MINISTERS. PENDING A DECISION FROM THE COUNCIL OF MINISTERS, A RECOMMENDATION WILL BE TRANSMITTED TO THE MINISTRY OF FINANCE FOR DISBURSEMENT OF THE APPROPRIATE FUNDS TO THE DESIGNATED AGENCY OR AGENCIES PROVIDING THE RELIEF.

4. WITH REGARD TO SAUDI MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS, THE APPROPRIATE MINISTRY WILL CONTRIBUTE TO THAT AGENCY'S OPERATING BUDGET. FOR EXAMPLE, THE MINISTRY OF LABOR PAYS SAUDI ARABIA'S CONTRIBUTION TO THE INTERNATIONAL LABOR ORGANIZATION (ILO), THE MINISTRY OF HEALTH TO THE WORLD HEALTH ORGANIZATION (WHO), AND THE MFA TO THE ARAB LEAGUE AND

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TO SECSTATE WASHDC PRIORITY 1443
INFO GULF COOPERATION COUNCIL
COLLECTIVE
AMEMBASSY ALGIERS
AMEMBASSY ALMATY
AMEMBASSY BEIRUT
AMEMBASSY DAKAR
AMEMBASSY RABAT
DEPT OF TREASURY WASHDC

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STATE FOR NEA/RA, NEA/ARP, EB/ESC AND S/CT
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AND OFAC/NEWCOMB

E.O. 12958: N/A
TAGS: SAID, ECON, EFIN, ETRD, SA

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SUBJECT: OFFICIAL SAUDI AID: A LONG TRADITION

OTHER AGENCIES. THE MINISTRY OF FINANCE MANAGES SAUDI ARABIA'S PARTICIPATION IN, AND CONTRIBUTIONS TO, THE IMF AND WORLD BANK AND ALSO FINANCES THE IMPLEMENTATION OF SMALL PROJECTS IN MUSLIM AND NON-MUSLIM COUNTRIES (E.G., THE CONSTRUCTION OF MOSQUES, SCHOOLS, AND HOSPITALS). ACCORDING TO THE LOCAL PRESS, SAUDI ARABIA HAS ESTABLISHED 210 ISLAMIC CENTERS IN NON-ISLAMIC COUNTRIES IN EUROPE, NORTH AND SOUTH AMERICA, AUSTRALIA, AND ASIA. PERSONAL

CONTRIBUTIONS FROM KING FAHD AND OTHER SENIOR SAUDI ROYALS ALSO CONTRIBUTE TO THE BUILDING OF MOSQUES AND THE PRINTING/DISTRIBUTION OF COPIES OF THE QURAN IN THESE COUNTRIES.

SAUDI FUND FOR DEVELOPMENT (SFD) - MAIN AID AGENCY

5. THE SFD IS SAUDI ARABIA'S MAIN AGENCY FOR DEVELOPMENT ASSISTANCE. IT WAS ESTABLISHED IN 1974 AND IS ADMINISTERED BY A BOARD OF DIRECTORS CHAIRED BY THE MINISTER OF FINANCE AND NATIONAL ECONOMY. SFD'S OPERATING CAPITAL WAS RAISED TO APPROXIMATELY $8.2 BILLION IN 1991. SFD PROVIDES CONCESSIONAL LOANS AND GRANTS TO FINANCE MAJOR PROJECTS. IT USUALLY WORKS IN COOPERATION WITH OTHER MAJOR LENDING INSTITUTIONS IN PARTNERSHIP WITH THE RECIPIENT GOVERNMENT. IT MAX ALSO CARRY OUT PROJECTS ON BEHALF OF THE MINISTRY OF FINANCE DUE TO SFD'S IN-HOUSE TECHNICAL EXPERTISE. WHEREAS THE MINISTRY OF FINANCE MAY FUND THE CONSTRUCTION OF A SINGLE MOSQUE OR SCHOOL, SFD PARTICIPATES IN THE CONSTRUCTION OF SCHOOLS AS PART OF A LARGER PROJECT TO BUILD UP THE EDUCATIONAL SYSTEM WITHIN A COUNTRY. FOR

EXAMPLE, SFD RECENTLY ANNOUNCED A $26 MILLION JOINT PROJECT WITH THE EGYPTIAN GOVERNMENT TO CONSTRUCT 110 SCHOOLS. THE MAIN OBJECTIVE OF SFD'S ASSISTANCE IS TO CONTRIBUTE TO THE ECONOMIC AND SOCIAL WELL-BEING OF THE RECIPIENT COUNTRY. ALL LOANS ARE PAID AND REPAID IN SAUDI CURRENCY. THE SIZE OF A PROJECT IS NOT TO EXCEED 5% OF SFD'S CAPITAL OR 50% OF THE TOTAL PROJECT COSTS, AND THE AMOUNT GRANTED TO ANY COUNTRY MUST NOT EXCEED 10% OF SFD'S CAPITAL AT ANY ONE TIME.

6. ACCORDING TO SFD'S 2000 ANNUAL REPORT, SFD SIGNED FIVE LOAN AGREEMENTS WITH MOROCCO, SENEGAL, LEBANON, KAZAKHSTAN, AND ALGERIA WORTH APPROXIMATELY $57 MILLION. THE LOANS FINANCED PROJECTS IN SOCIAL INFRASTRUCTURE (FOUR PROJECTS IN HOUSING, HEALTH AND WATER SUPPLY) AND TRANSPORTATION (ONE PROJECT FOR ROADS). SFD ALSO CO-FINANCED TWO PROJECTS, ONE IN LEBANON FOR $11.7 MILLION (WITH THE IDB AND THE OPEC FUND FOR INTERNATIONAL DEVELOPMENT FOR A POTABLE WATER PROJECT) AND THE OTHER IN KAZAKHSTAN FOR $12 MILLION (WITH THE IDB FOR A ROAD CONSTRUCTION PROJECT). TOTAL DISBURSEMENTS IN 2000 AMOUNTED TO APPROXIMATELY $75 MILLION FOR 46 PROJECTS IN 23 COUNTRIES. FOR THE PERIOD 1975-2000, SFD FINANCED 320 DEVELOPMENT PROJECTS IN 63 COUNTRIES (39 IN AFRICA, 19 IN ASIA, AND 5 IN

EUROPE AND LATIN AMERICA) TO THE TUNE OF APPROXIMATELY $5.7 BILLION. ASIA RECEIVED THE LARGEST SHARE OF FINANCIAL AID (50.2%) FOLLOWED BY AFRICA (47.9%) AND OTHER COUNTRIES (1.9%). OVERALL, THE TRANSPORTATION SECTOR HAS RECEIVED THE GREATEST ATTENTION (33% OF ALL AID) DURING THIS PERIOD, FOLLOWED BY AGRICULTURE (20%), ENERGY (17.7%), SOCIAL INFRASTRUCTURE (16.9%), INDUSTRY AND MINING (840, AND OTHER SECTORS (2.3%).

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7. ONE OFFICIAL TOLD ECONOFF THAT MANY DOMESTIC CRITICS HAD SUGGESTED THAT SFD SHOULD FINANCE DEVELOPMENT PROJECTS IN SAUDI ARABIA. IN RESPONSE, THE GOVERNMENT SET-UP THE SAUDI EXPORT PROGRAM (SEP) IN 1999 WITHIN THE SFD, WHICH ALSO PROVIDES THE ANNUAL BUDGET FOR THE SEP. SEP'S MAIN OBJECTIVE IS TO BOOST NON-PETROLEUM SAUDI EXPORTS AND HAS SET UP LINES OF FINANCING WITH BANKS IN EGYPT AND JORDAN. SEP'S DIRECTOR GENERAL EXPLAINED THAT IN 2001 SEP CARRIED OUT ITS FIRST 10 TRANSACTIONS FOR APPROXIMATELY $100 MILLION. SEP HOPES TO BEGIN OPERATING AN INSURANCE PROGRAM SOON AND IS WORKING WITH FRANCE'S OFFICIAL EX-IM BANK, COFACE, TO IMPLEMENT THIS PLAN. ONE SENIOR BANKING OFFICIAL STATED THAT EARLY DISCUSSIONS ON ESTABLISHING SEP FOCUSED ON CREATING AN AGENCY SIMILAR TO THE U.S. EX-IM BANK.

SAUDI PARTICIPATION IN MAJOR AID AND FINANCE INSTITUTIONS

8. SAUDI ARABIA HOLDS POSITIONS ON THE EXECUTIVE BOARDS OF THE IMF AND WORLD BANK, AND PARTICIPATES IN SEVERAL ISLAMIC AND ARAB ORGANIZATIONS AND BANKS. MORE RECENTLY, MS. THORAYA OBAID WAS ELECTED EXECUTIVE GENERAL OF THE UNFPA IN 2001, THE FIRST SAUDI NATIONAL TO HEAD A UN AGENCY. SAUDI ARABIA'S POSITION IN FINANCIAL AID AGENCIES UP TO 2000 WAS REPORTED AS FOLLOWS:

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AMEMBASSY BEIRUT
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AMEMBASSY RABAT
DEPT OF TREASURY WASHDC

UNCLAS SECTION 03 OF 04 RIYADH 003538

STATE FOR NEA/RA, NEA/ARP, EB/ESC AND S/CT
TREASURY FOR OASIA/KIFAYAT, OGC/AUFHAUSER
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E.O. 12958: N/A
TAGS: SAID, ECON, EFIN, ETRD, SA

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SUBJECT: OFFICIAL SAUDI AID: A LONG TRADITION

ORGANIZATION CONTRIBUTION (USD) % OF TOTAL

CAPITAL		
ARAB MONETARY FUND	184,447,560	14.80
ARAB FUND FOR ECONOMIC & SOCIAL DEVELOPMENT	516,118,522	23.99
ARAB BANK FOR ECONOMIC DEVELOPMENT IN AFRICA	366,939,000	24.46
ARAB CORPORATION FOR INVESTMENT GUARANTEE	12,167,250	14.88
ISLAMIC DEVELOPMENT BANK	1,266,705,051	24.56
AFRICAN DEVELOPMENT BANK	58,968,000	0.228
AFRICAN DEVELOPMENT FUND	281,574,126	0.983
OPEC FUND FOR INTERNATIONAL DEVELOPMENT	1,033,279,607	30.10
WORLD BANK	5,403,845,000	2.87
IMF	8,941,440,000	3.29

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INTERNATIONAL DEVELOPMENT ASSOCIATION	2,154,120,000	2.00
INTERNATIONAL FINANCE CORPORATION	30,062,000	1.28
INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT	369,778,000	11.00
MULTILATERAL INVESTMENT GUARANTEE AGENCY	46,872,000	2.40

NON-OFFICIAL AID

9. [redacted] MINISTRY OF FINANCE, TOLD ECONOFF THAT MANY SAUDI-BASED ORGANIZATIONS AND CHARITIES, INCLUDING THE INTERNATIONAL ISLAMIC RELIEF ORGANIZATION (IIRO), THE MUSLIM WORLD LEAGUE (MWL), OR THE WORLD ASSEMBLY OF MUSLIM YOUTH (WAMY), ALSO FUNDED ACTIVITIES AND PROJECTS AROUND THE WORLD. HE SAID THAT IN SOME

CASES THEIR OPERATIONS WERE SO EXTENSIVE THAT THEY APPEARED TO BE OFFICIAL SAUDI GOVERNMENT ORGANIZATIONS. THE PRESS REPORTED THAT THERE WERE 232 CHARITIES CURRENTLY REGISTERED IN SAUDI ARABIA WITH TOTAL OPERATING INCOME OVER $226 MILLION.

10. A POPULAR MECHANISM TO RAISE MONEY FOR CHARITABLE CAUSES UNCLASSIFIED

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IN SAUDI ARABIA IS THE TELETHON. SAUDI ARABIA RECENTLY HELD A TELETHON FOR PALESTINIANS THAT RAISED MORE THAN $110 MILLION. THIS WAS IN ADDITION TO SAUDI ARABIA'S $250 MILLION CONTRIBUTION TO THE AL AQSA AND AL QUDS INTIFADA FUNDS SET UP BY CROWN PRINCE ABDULLAH DURING THE ARAB SUMMIT IN CAIRO LAST YEAR. TOTAL SAUDI AID TO PALESTINE IS REPORTED TO EXCEED $2.6 BILLION (THIS FIGURE INCLUDES AID DATING BACK TO THE 1993 OSLO ACCORDS). TELETHONS INCREASE THE SIZE OF SAUDI ARABIA'S FINANCIAL CONTRIBUTIONS BY MOBILIZING THE PUBLIC AROUND AN "ISLAMIC," OR HUMANITARIAN, CAUSE. IT IS ALSO A USEFUL WAY FOR THE GOVERNMENT TO CHANNEL PUBLIC FRUSTRATION BY FOCUSING THEIR ATTENTION ON "USEFUL" ACTIVITIES THAT SERVE A GREATER PURPOSE RATHER THAN ENCOURAGING INDIVIDUALS TO UNDERTAKE THEIR OWN INITIATIVES.

11. ANOTHER FEATURE OF SAUDI AID IS THE SET UP OF "COMMITTEES" THAT CHANNEL

PRIVATE CONTRIBUTIONS TO SPECIFIC COUNTRIES OF CONCERN. SUCH COMMITTEES HAVE BEEN SET UP FOR BOSNIA, AFGHANISTAN, KOSOVO/CHECHNYA, AND TO AID THE PALESTINIANS. THESE COMMITTEES ARE USUALLY HEADED BY LEADING SAUDI FIGURES. FOR EXAMPLE, THE "SAUDI COMMITTEE FOR AFGHAN ASSISTANCE" AND THE "COMMITTEE FOR THE SUPPORT OF THE AL QUDS INTIFADA" TO PROVIDE AID TO PALESTINIANS ARE BOTH HEADED BY THE SAUDI MINISTER OF INTERIOR PRINCE NAIF. ANOTHER COMMITTEE, THE "POPULAR COMMITTEE FOR THE SUPPORT OF THE

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AMEMBASSY DAKAR
AMEMBASSY RABAT
DEPT OF TREASURY WASHDC

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PAGE 02 RIYADH 03538 04 OF 04 161209Z

SUBJECT: OFFICIAL SAUDI AID: A LONG TRADITION

PALESTINIAN MUJAHEDEEN" IS SUPERVISED BY THE GOVERNOR OF RIYADH PRINCE SALMAN. EACH COMMITTEE RAISES ITS FUNDS FROM THE PUBLIC. (NOTE: PRINCE NAIF AND PRINCE SAIMAN ARE THE TWO PREDOMINANT ACTORS IN THIS TYPE OF NON-GOVERNMENT ASSISTANCE EFFORTS. END NOTE.) MEMBERS OF THE ROYAL FAMILY, INCLUDING KING FAHD, CROWN PRINCE ABDULLAH, AND PRINCE ALWALEED BIN TALAAL, ALL MADE SUBSTANTIAL PERSONAL CONTRIBUTIONS TO THE AFGHAN AND PALESTINIAN COMMITTEES. CHARITIES, SUCH *AS* WAMY, THE MUSLIM WORLD LEAGUE, AND THE AL HARAMAIN FOUNDATION, CONTRIBUTED UP TO $5 MILLION THROUGH THE AFGHAN COMMITTEE. IMPLEMENTING PARTNERS VARY, BUT IN MANY CASES THE COLLECTED FUNDS WILL BE PASSED TO AGENCIES SUCH *AS* THE RED CRESCENT SOCIETY OR OTHER BODIES OPERATING ON THE GROUND *AS* APPROPRIATE FOR DISTRIBUTION TO FINAL RECIPIENTS. ALTHOUGH CONTRIBUTIONS TO THESE

DIFFERENT CAUSES FROM LEADING SAUDI ROYALS ARE CONSIDERED "PRIVATE" DONATIONS, MANY SAUDIS DO NOT MAKE A DISTINCTION BETWEEN THESE DONATIONS AND OFFICIAL (BUDGETED) GOVERNMENT AID.

COMMENT

12. SAUDI ARABIA HAS PLAYED A LEADING ROLE IN PROVIDING INTERNATIONAL AID TO DEVELOPING COUNTRIES FOR DECADES. WHILE WE EXPECT SAUDI ARABIA TO CONTINUE TO PLAY AN IMPORTANT ROLE IN PROVIDING HUMANITARIAN AND DEVELOPMENT ASSISTANCE, THE AMOUNT SAUDI ARABIA IS WILLING AND ABLE TO CONTRIBUTE IS CLEARLY DIMINISHING. ANNUAL AID ALLOCATIONS ARE HIGHLY SENSITIVE TO BUDGETARY PRESSURES *AS* A RESULT OF FLUCTUATING

OIL REVENUES AND AN ECONOMY UNABLE TO KEEP PACE WITH A GROWING POPULATION. THIS LOOK AT SAUDI ASSISTANCE UNDERSCORES THE DIFFICULTY IN DISTINGUISHING BETWEEN "OFFICIAL" BUDGETED AID AND "NON-OFFICIAL" ASSISTANCE ORGANIZED, MANAGED, AND PARTLY FUNDED BY PROMINENT MEMBERS OF THE ROYAL FAMILY HOLDING KEY POSITIONS IN THE GOVERNMENT. ALTHOUGH THE SAUDI GOVERNMENT PLANS TO EXERCISE GREATER CONTROL OVER LICENSED SAUDI CHARITIES, TELETHON FUNDS AND INDIVIDUAL DONATIONS BY

WEALTHY INDIVIDUALS REMAIN LARGELY UNREGULATED.

END COMMENT.

SCOBEY

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<< END OF DOCUMENT >>

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUL 2008 200706658

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UNCLASSIFIED PTQ5563
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PAGE 01 STATE 073093 171949Z
ORIGIN NEA-00

INFO	LOG-00	NP-00	AID-00	ACQ-00	CIAE-00	INL-00	USIE-00
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SOURCE: KODAKB.017005
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APPROVED BY: NEA:JLAROCCO
NEA: DSATTERFIELD
NEA/IPA: DHAIE
EUR/ERA: CMURRAY
NEA/ARP: KSASAHARA
EAP/J: BMOHLER
EUR/NB: AHAIL
NEA/ENA: SPIKE/LTSOU
NEA/ARN: SZIADEH
EUR/RUS: KANDERTON
WHA/CAN: PFITZGERALD
AID/ANE/WBG: CWOLTERS

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AMEMBASSY TUNIS IMMEDIATE
AMCONSUL JEDDAH IMMEDIATE
AMEMBASSY RIYADH IMMEDIATE
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AMEMBASSY CAIRO IMMEDIATE

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AMEMBASSY OTTAWA IMMEDIATE
INFO ARAB LEAGUE COLLECTIVE IMMEDIATE

UNCLAS STATE 073093

CAIRO/JERUSALEM PLEASE PASS TO A/S BURNS

E.O. 12958: N/A
TAGS: EAID, PREL, KPAL, KWBG, NO, BE
SUBJECT: U.S. OBJECTIVES FOR THE APRIL 25 AHLC DONORS' CONFERENCE

1. DRAWING ON POINTS BELOW, ACTION ADDRESSEES ARE REQUESTED TO BRIEF APPROPRIATE HOST GOVERNMENT OFFICIALS ON U.S. OBJECTIVES FOR THE APRIL 25 AHLC DONORS' MEETING IN OSLO.

2. FOR POSTS' INFORMATION: THE AHLC (AD HOC LIAISON COMMITTEE) IS THE PRINCIPLE DONOR COORDINATION BODY FOR PALESTINIAN ECONOMIC ASSISTANCE WHICH BEGAN AFTER THE SIGNING OF THE OSLO ACCORDS. MEMBERSHIP IS AS FOLLOWS: NORWAY (AHLC CHAIR), WORLD BANK (AHLC SECRETARIAT), U.S., RUSSIA (PEACE PROCESS CO-SPONSORS), ISRAEL, THE PALESTINIANS, JORDAN, EGYPT (THE "CORE PARTIES"), SAUDI ARABIA (REPRESENTING GCC), TUNISIA (REPRESENTING NORTH

AFRICA), CANADA, JAPAN, THE UN, AND THE IMF. OTHER PARTICIPANTS, SUCH AS THE ISLAMIC DEVELOPMENT BANK, PARTICIPATE AS GUESTS OF THE CHAIR.

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3. THIS AHLC IS A DONORS-ONLY MEETING, I.E. WITHOUT ISRAELI OR PALESTINIAN REPRESENTATIVES, IN ORDER TO MAINTAIN THE FOCUS ON ECONOMIC ASSISTANCE, RATHER THAN POLITICAL ISSUES. THE PARTIES WILL BE INVITED TO PARTICIPATE IN BILATERAL CONSULTATIONS WITH AHLC PARTICIPANTS IN OSLO ON APRIL 24. ALTHOUGH THE LOCAL COUNTERPARTS TO THE AHLC HAVE MET CONSISTENTLY OVER THE PAST YEAR TO COORDINATE DONOR PROGRAMS, THIS WILL BE THE FIRST INTERNATIONAL ("CAPITALS-LEVEL") DONORS MEETING SINCE APRIL 11, 2001 IN STOCKHOLM.

4. BEGIN POINTS:

-- THE U.S. LOOKS FORWARD TO A PRODUCTIVE AHLC DONORS' CONFERENCE ON APRIL 25 IN OSLO, THE FIRST SUCH MEETING IN OVER A YEAR. WE ARE VERY APPRECIATIVE OF THE GOVERNMENT OF NORWAY'S OFFER TO HOST THE MEETING, WHICH COMES AT A PARTICULARLY DIFFICULT MOMENT.

-- THE RECENT DETERIORATION OF THE SITUATION UNDERSCORES THE IMPORTANCE OF RENEWING SECURITY COOPERATION AND RETURNING TO A PEACEFUL POLITICAL PROCESS. THE VIOLENCE MUST END, AND THE

PALESTINIANS MUST WORK INTENSIVELY TOWARD THAT END. THE ISRAELIS MUST WITHDRAW FROM THE AREAS THEY RECENTLY ENTERED. AND THE INTERNATIONAL COMMUNITY MUST BE MOBILIZED IF WE ARE TO AVERT A HUMANITARIAN CATASTROPHE IN THE WEST BANK AND GAZA THAT WOULD MAKE THE POLITICAL AND SECURITY CHALLENGES THAT MUCH MORE DIFFICULT.

-- WE HAVE ALL BEEN DISAPPOINTED BY THE RECENT TURN OF

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EVENTS. BUT WE REMAIN COMMITTED TO HELPING THE PALESTINIAN PEOPLE AND REBUILDING THE INSTITUTIONS OF THE PALESTINIAN AUTHORITY. THE U.S. IS WORKING HARD TO GET A PARALLEL SECURITY AND POLITICAL PROCESS IN PLACE. WE, AND OTHER MEMBERS OF THE INTERNATIONAL COMMUNITY, WILL CONTINUE TO REINFORCE WITH THE ISRAELI GOVERNMENT THE NEED TO FACILITATE HUMANITARIAN OPERATIONS AND DONOR ASSISTANCE EFFORTS.

-- THE RESPONSE THUS FAR OF INTERNATIONAL DONORS HAS BEEN IMPRESSIVE, AND WE LOOK TO THE OSLO MEETING TO CEMENT THAT COMMITMENT AND REINVIGORATE THE DONOR COORDINATION PROCESS THAT HAS LONG BEEN A CORNERSTONE OF OUR EFFORTS AT ISRAELI-PALESTINIAN CONCILIATION.

-- WE UNDERSTAND THAT THE MEETING WILL BEGIN WITH A REVIEW OF THE CURRENT

HUMANITARIAN CRISIS AND DONOR EFFORTS TO ALLEVIATE THAT CRISIS AND REPAIR DAMAGED INFRASTRUCTURE.

-- WHILE AHLC MEETINGS ARE TRADITIONALLY NOT PLEDGING EVENTS, WE CONSIDER IT APPROPRIATE TO MAKE AN EXCEPTION IN THIS CASE AND TO INCORPORATE A PLEDGING DIMENSION INTO THIS FIRST SESSION. IT IS VITAL THAT DONORS BE RESPONSIVE TO THE CURRENT EMERGENCY SITUATION. THE UNITED STATES WILL BE PREPARED TO ANNOUNCE SIGNIFICANT CONTRIBUTIONS TO THE HUMANITARIAN RELIEF EFFORT AND WE HOPE OTHER DONORS WILL DO THE SAME.

-- WE ALSO LOOK FORWARD TO A DISCUSSION OF THE RECENT WORLD BANK ASSESSMENT AND ITS IMPLICATIONS FOR THE

INTERNATIONAL DONOR EFFORT; AN EXCHANGE OF INFORMATION ON CURRENT RESOURCES AVAILABLE FOR WEST BANK/GAZA ASSISTANCE; AND A DISCUSSION OF CURRENT PROJECTS TO ENSURE THAT OUR PRIORITIES ARE IN ALIGNMENT.

-- THE U.S. IS PREPARED TO MAKE A PRESENTATION ON THE CURRENT U.S. ASSISTANCE PROGRAM, INCLUDING OUR PRESENT AND EXPECTED RESOURCE LEVELS, CURRENT U.S. PROGRAMS, AND A DISCUSSION OF HOW OUR PROGRAMS HAVE ADAPTED TO THE CRISIS OF THE PAST YEAR.

– WE ALSO LOOK FORWARD TO HEARING THE PARTICIPANTS' RECOMMENDATIONS FOR MEDIUM- AND LONG-TERM ASSISTANCE IN LIGHT OF THE VARIOUS SCENARIOS IN THE WORLD BANK REPORT.

– IT IS VITAL THAT EVEN AS WE RESPOND TO THE CURRENT EMERGENCY WE NOT LOSE SIGHT OF THE LONGER-TERM OBJECTIVES OF THE DEVELOPMENT EFFORT. AS PRESIDENT BUSH AND SECRETARY POWELL HAVE MADE CLEAR, OUR VISION IS FOR TWO STATES, ISRAEL AND PALESTINE, LIVING SIDE-BY-SIDE IN PEACE AND SECURITY.

– WE LOOK FORWARD TO INPUT AND IDEAS FROM OTHER DELEGATIONS.

– THE U.S. DELEGATION WILL BE AVAILABLE FOR BILATERAL DISCUSSIONS AT THE MEETING SITE ON WEDNESDAY, APRIL, 24.

5. FOR RIYADH AND JEDDAH (ADDITIONAL POINT FOR SAG AND APPROPRIATE IDE OFFICIALS):

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– SAUDI ARABIA AND THE IDB HAVE BEEN IN THE FOREFRONT OF DONOR EFFORTS FOR THE PALESTINIANS AND HAVE SHOWN A GENUINE COMMITMENT TO BUILDING AND SUSTAINING INSTITUTIONS FOR THE PALESTINIANS' FUTURE. IN PARTICULAR, BUDGETARY SUPPORT FOR THE PA FROM THE SAUDI AND OTHER ARAB

GOVERNMENTS THROUGH THE ARAB LEAGUE AND ASSISTANCE PROJECTS UNDERTAKEN BY

THE ISLAMIC DEVELOPMENT BANK HAVE BEEN CRITICAL TO THE CONTINUED FUNCTIONING OF THE PA. WE LOOK FORWARD TO SAUDI AND IDB PARTICIPATION IN OSLO.

6. FOR CAIRO (ADDITIONAL POINT FOR APPROPRIATE ARAB LEAGUE OFFICIALS):

-- GIVEN THE ARAB LEAGUE'S ROLE AS THE CHANNEL FOR PA BUDGETARY SUPPORT, WE ARE LOOKING FORWARD TO ARAB LEAGUE PARTICIPATION AT THE AHLC. THE GENEROUS ARAB LEAGUE CONTRIBUTIONS HAVE BEEN INSTRUMENTAL IN KEEPING THE PA VIABLE AND PREVENTING A MASSIVE SURGE IN PALESTINIAN UNEMPLOYMENT.

7. FOR TEL AVIV AND JERUSALEM: DRAWING FROM THE ABOVE POINTS, POSTS SHOULD BRIEF APPROPRIATE GOI AND PA

OFFICIALS ON OUR EXPECTATIONS FOR THE AHLC AND OUR HOPE THAT THE NEXT SUCH DONOR EVENT WILL INCLUDE ISRAELI AND PALESTINIAN REPRESENTATIVES.

POWELL

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 24 JUL 2008 200706658

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INFO ARAB ISRAELI COLLECTIVE IMMEDIATE

CONFIDENTIAL SECTION 01 OF 03 JERUSALEM 000370

DEPARTMENT FOR NEA FRONT OFFICE, NEA/IPA AND NEA/RA

E.O. 12958: DECL: 02/07/12
TAGS: ECON, EFIN, KWBG, EAID
SUBJECT: PA SCRAMBLING TO PAY WAGE BILL AS WORST FISCAL CRISIS YET LOOMS

CLASSIFIED BY CONSUL-GENERAL RONALD L. S CHL I CHER, REASONS 1.5 (B) AND (D).

1. (U) THIS IS AN ACTION REQUEST -- SEE PARA 9.

SUMMARY AND COMMENT

2. (C) THE PALESTINIAN AUTHORITY IS IN ITS WORST FINANCIAL CRISIS IN ITS EIGHT-YEAR HISTORY. ALREADY A WEEK OVERDUE IN PAYING ITS JANUARY WAGE BILL, THE PA IS STILL SCRAMBLING TO FIND THE NECESSARY FINANCING FROM DONORS. WITH ONLY $41.5 MILLION IN HAND AGAINST A $57 MILLION WAGE BILL, THE PA IS HOPING TO SECURE ADDITIONAL FUNDS FROM THE IDB AND/ OR THE UAE AND QATAR (WHICH HAVE PLEDGED TO HELP, ACCORDING TO PA PLANNING MINISTER SHA'ATH). IF ALL OF THE REPORTEDLY-PLEDGED ASSISTANCE MATERIALIZES -- WHICH IS FAR FROM CERTAIN -- THE PA WILL JUST BE ABLE TO PAY ITS JANUARY AND FEBRUARY WAGE BILLS BUT HAVE NO FUNDS LEFTOVER FOR ANY ESSENTIAL SERVICES OR SUPPLIES. PA OFFICIALS HOPE THAT, DURING THE LATE MARCH ARAB LEAGUE SUMMIT, A NEW ASSISTANCE PACKAGE CAN BE OFFICIALLY ENDORSED THAT WOULD HELP COVER BOTH WAGES AND ESSENTIAL SUPPLIES AND SERVICES. NORWAY (AS CHAIR OF THE DONOR EFFORT), THE WORLD BANK, AND THE IMF ARE PRESENTLY WORKING ON WHAT IS INTENDED TO BE A JOINT PRESENTATION TO DONORS THAT THE PA NEEDS $100 MILLION TO MEET WAGES AND ESSENTIAL SERVICES UNTIL THE ARAB LEAGUE MINISTERIAL -- $40 MILLION IMMEDIATELY AND $60 MILLION IN THE NEXT FEW WEEKS. REFERRING TO THE $100 MILLION

FIGURE, PALESTINIAN MINISTER OF LOCAL GOVERNMENT [redacted] AND UNSCO [redacted] BOTH STRESSED TO CONSUL-GENERAL AND DPO ON 2/07 THE DIRE FINANCIAL STRAITS THE PA CURRENTLY FINDS ITSELF IN. WE AGREE THAT THE DEEP CONCERN IS WARRANTED. A FAILURE TO PAY SALARIES WOULD RESULT IN SEVERE ECONOMIC, POLITICAL, AND SECURITY RAMIFICATIONS. END SUMMARY AND

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COMMENT.

NEEDED: 40 MILLION DOLLARS, IMMEDIATELY

3. (C) ACCORDING TO IMF RESREP [redacted] THE PALESTINIAN AUTHORITY IS SCRAMBLING FOR FUNDS TO COVER ITS JANUARY PUBLIC SECTOR WAGE BILL OF ABOUT USD 57 MILLION. (EACH MONTH'S WAGES ARE DUE AT THE END OF THE MONTH, MEANING THAT JANUARY PUBLIC SECTOR WAGES ARE NOW A WEEK OVERDUE.) [redacted] REPORTS THAT THE PA'S ONLY RESOURCES ARE ABOUT $20 MILLION IN DOMESTIC TAX COLLECTIONS, AND ABOUT $9 MILLION FROM THE EUROPEAN UNION, LEAVING A GAP OF ALMOST $30 MILLION. ARAB BANK WB/G DIRECTOR [redacted] REPORTS THAT, IN ADDITION, THE ISLAMIC DEVELOPMENT BANK (IDB) HAS DELIVERED $12.5 MILLION THIS WEEK (SEE PARA 5 BELOW), LEAVING A RESIDUAL GAP FOR WAGES ALONE OF $15.5 MILLION. ON TOP OF WAGES, OF COURSE, THE PA ALSO MUST PAY FOR ESSENTIAL SUPPLIES AND SERVICES.

UNSCO [redacted] TOLD THE CG THAT, TO ALLOW THE PA TO MAKE ITS WAGE BILL AND CONTINUE ESSENTIAL SERVICES, $40 MILLION IS NEEDED IMMEDIATELY, A POINT ALSO EMPHASIZED IN A DRAFT POSITION PAPER BEING DEVELOPED BY THE WORLD BANK, IMF, AND THE NORWEGIAN REPRESENTATIVE TO THE PA.

BACKGROUND

4. (C) THE ARAB LEAGUE'S PROGRAM OF $45 MILLION IN MONTHLY BUDGETARY ASSISTANCE TO THE PA, WHICH HAS PLAYED

THE ESSENTIAL ROLE IN KEEPING THE PA AFLOAT AFTER ISRAEL SUSPENDED THE REVENUE CLEARANCE SYSTEM, EXPIRED AT THE END OF DECEMBER 2001. AT THE NOVEMBER 2001 MEETING IN DAMASCUS OF ARAB LEAGUE FOREIGN MINISTERS, PARTICIPANTS AGREED TO CONTINUE THE FUNDING IN 2002, AND IN FACT TO INCREASE IT TO $55 MILLION PER MONTH (OUT OF RECOGNITION OF THE CONTINUED DETERIORATION OF THE PALESTINIAN ECONOMY), WITH THE ADDITIONAL $10 MILLION TO BE REPAID SHOULD THE GOI RESUME REVENUE TRANSFERS. HOWEVER, UNDER ARAB LEAGUE RULES, THAT RECOMMENDATION CANNOT BE IMPLEMENTED UNTIL IT IS FORMALLY ADOPTED AT THE MARCH 25-26 ARAB LEAGUE SUMMIT. RECOGNIZING THE JANUARY-MARCH FINANCING GAP THE PA WOULD FACE, THE ARAB LEAGUE FOREIGN

MINISTERS THEREFORE AGREED THAT ASSISTANCE SHOULD BE CONTINUED FOR THE FIRST THREE MONTHS OF 2002, BUT THIS PLEDGE WAS SOMEWHAT EMPTY AS THE MINISTERS LEFT IT UP TO THE PA TO RAISE THIS MONEY BILATERALLY FROM ARAB LEAGUE MEMBERS. IN DAMASCUS, PA MINISTER OF PLANNING AND INTERNATIONAL COOPERATION [redacted] DID SUCCEED IN WINNING A COMMITMENT FROM THE SAUDIS TO PROVIDE $45 MILLION IN GRANT ASSISTANCE FROM THE SAUDI FUND, WHICH WOULD BE DISBURSED IN THREE $15 MILLION TRANCHES BETWEEN JANUARY AND MARCH.

5. (C) IN EARLY JANUARY, SHA'ATH VISITED RIYADH AND

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PAGE 01        JERUSA  00370  02 OF 03  0805132
ACTION NEA-00

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      SAS-00     /010W
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FM AMCONSUL JERUSALEM
TO SECSTATE WASHDC IMMEDIATE 6690
INFO ARAB ISRAELI COLLECTIVE IMMEDIATE

CONFIDENTIAL SECTION 02 OF 03 JERUSALEM 000370

DEPARTMENT FOR NEA FRONT OFFICE, NEA/IPA AND NEA/RA

E.O. 12958: DECL: 02/07/12
TAGS: ECON, EFIN, KWBG, EAID
SUBJECT: PA SCRAMBLING TO PAY WAGE BILL AS WORST FISCAL CRISIS YET LOOMS

SIGNED AN MOU REGARDING THE $45 MILLION. THE PA WAS ABLE TO USE THIS MOU AS COLLATERAL FOR A $45 MILLION LOAN FROM THE ARAB BANK, WHICH ENABLED IT TO PAY DECEMBER WAGES (WHICH WERE DUE ON DECEMBER 31 BUT ACTUALLY ONLY PAID ABOUT A WEEK LATER, AFTER THE MOU WAS SIGNED). HOWEVER,

THIS LEFT THE PA WITH NO OTHER ARAB COMMITMENTS TO HELP COVER FEBRUARY AND MARCH WAGES. ACCORDING TO ARAB BANK DIRECTOR FOR THE WB/G [redacted] THE SAUDIS AGREED TO ENCOURAGE OTHER ARAB LEAGUE MEMBERS TO PONY UP AND TO WORK WITH THE ISLAMIC DEVELOPMENT BANK (IDB) TO DEPROGRAM SOME UNOBLIGATED PROJECT ASSISTANCE AND RELEASE IT TO COVER PA FISCAL EXPENDITURES. IN LATE JANUARY, THE IDB OFFERED THE PA TWO MONTHLY TRANCHES OF $12.5 MILLION FROM THE "UNATTACHED" PROJECT MONEY. THE PA PROTESTED, WITHOUT SUCCESS, THAT THIS WAS NOT NEARLY ENOUGH,

ARGUING THAT THE IDB COULD DO MORE IF IT AT LEAST TEMPORARILY DE-OBLIGATED SOME OF THE "ATTACHED" PROJECT ASSISTANCE - WITH THE OPTION OF REPLENISHING THE FUNDS AFTER THE ARAB LEAGUE SUMMIT. [redacted] REPORTS THAT THE FIRST $12.5 MILLION TRANCHE FROM THE IDB WAS RECEIVED THIS WEEK,

COBBLING TOGETHER THE WAGES

6. (C) [redacted] HAS TOLD [redacted] THAT THE PA HAS SECURED OTHER PLEDGESFROM THE UAE FOR $30 MILLION AND FROM QATAR FOR $15 MILLION (ALTHOUGH [redacted] STRESSED THAT HE HAS NO INDEPENDENT CONFIRMATION COMMITMENTS AND IS ESPECIALLY DUBIOUS ABOUT THE REPORTED QATARI PLEDGE). ACCORDING TO [redacted] IS NOW TRYING TO CONVINCE THE UAE TO DISBURSE THEIR ENTIRE $30 MILLION PLEDGE UP FRONT (RATHER THAN IN TWO MONTHLY INSTALLMENTS AS PROPOSED) AND IS SIMILARLY URGING THE IDB TO BRING FORTH ITS SECOND TRANCE OF $12.5 MILLION NOW. IF HE IS SUCCESSFUL ON EITHER FRONT, JANUARY WAGES, WHILE LATE,

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COULD BE PAID. ADDING IN THE EU CONTRIBUTION, IF ALL OF THE MONEY PLEDGED FOR THE TWO-MONTH PERIOD COMES IN AND $20 MILLION PER MONTH IN DOMESTIC COLLECTIONS IS MAINTAINED, THE PA WOULD HAVE ABOUT $128 MILLION FOR FEBRUARY AND MARCH COMBINED -- ENOUGH TO COVER

JANUARY AND FEBRUARY WAGES, BUT WITH ONLY ABOUT $14 MILLION LEFT OVER TO COVER ALL OTHER EXPENDITURES, OR ONLY $7 MILLION PER MONTH. (THROUGHOUT THE INTIFADA, THE PA HAS TYPICALLY RAISED BETWEEN $20 AND $30 MILLION PER MONTH IN ADDITION TO WAGE COSTS TO COVER OTHER RECURRING EXPENSES. IN ADDITION, THE PA HAS AN EVER GROWING DEBT TO PUBLIC AND PRIVATE SUPPLIERS IN BOTH ISRAEL AND THE PALESTINIAN TERRITORIES.)

IMF, WORLD BANK, NORWAY:
$100 MILLION NEEDED

7. (C) [redacted] THE NORWEGIAN REPRESENTATIVE TO THE PA (AND CHAIR OF THE LOCAL DONOR EFFORT), IS CURRENTLY WORKING WITH THE [redacted] OF THE WORLD BANK TO DEVELOP A JOINT POSITION PAPER WHICH LAYS OUT IN STARK TERMS WHAT IS NEEDED TO KEEP THE PA AFLOAT. ACCORDING TO THE DRAFT, THEY SEEK $100 MILLION IN EXTRA FINANCING FOR THE NEXT TWO MONTHS – $40 MILLION IMMEDIATELY AND $60 MILLION IN THE NEXT FEW WEEKS. THIS WOULD ALLOW THE PA TO MEET THE JANUARY AND FEBRUARY PAYROLLS WHILE ALSO MAINTAINING ESSENTIAL SERVICES. THE IMF ESTIMATES THAT A "BARE BONES" PA BUDGET WOULD BE APPROXIMATELY $90 MILLION MONTHLY. INDEED, THE $100 MILLION FIGURE IS BEING SEIZED UPON BY PA OFFICIALS AS WELL AS OTHER INTERESTED PARTIES, WITH BOTH UNSCO [redacted]

AND [redacted] NOTING THAT AMOUNT TO CG IN DISCUSSIONS ON 2/07.

COMMENT AND ACTION REQUEST

8. (C) IF THE PA FAILS TO PAY WAGES IT WOULD BE A FIRST. WAGES HAVE BEEN UP TO A WEEK OR TEN DAYS LATE AT OTHER TIMES IN THE INTIFADA, BUT IN THOSE TIMES IT WAS ALWAYS A QUESTION OF FINALIZING VARIOUS DONOR PAYMENTS. THIS TIME, THE MONEY SIMPLY ISN'T THERE OR ISN'T FORTHCOMING. AS WE HAVE NOTED FREQUENTLY IN THE PAST, FAILURE TO PAY PUBLIC SECTOR WAGES WOULD HAVE SEVERE ECONOMIC AND HUMANITARIAN AS WELL AS POLITICAL AND SECURITY RAMIFICATIONS. BEYOND WAGES, PA PURCHASES OF SERVICES AND SUPPLIES PROVIDES ONE OF THE FEW CASH INFUSIONS INTO THE PALESTINIAN PRIVATE SECTOR – AND PALESTINIAN BUSINESSES (LIKE ISRAELI UTILITIES, HOSPITALS, AND BUSINESSES) ARE EITHER UNABLE OR UNWILLING TO PROVIDE THE PA GOODS AND SERVICES ON CREDIT INDEFINITELY. WE DO NOT BELIEVE THAT WE ARE "CRYING WOLF" IN DESCRIBING THE CURRENT SITUATION AS THE WORST FINANCIAL CRISIS THE PA HAS FACED IN ITS EIGHT-YEAR EXISTENCE. THE IMMEDIATE CAUSE OF THIS CRISIS, OF COURSE, IS THE CONTINUED HOLDING BY ISRAEL OF PA TAX REVENUE, BUT THE DROP IN ECONOMIC

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PAGE 01        JERUSA 00370  03 OF 03  080513Z
ACTION NEA-00

INFO  LOG-00   NP-00    AID-00   CRA-01   CIAE-00  COME-00  CTME-00
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INFO ARAB ISRAELI COLLECTIVE IMMEDIATE

CONFIDENTIALSECTION 03 OF 03 JERUSALEM 000370

DEPARTMENT FOR NEA FRONT OFFICE, NEA/IPA AND NEA/RA

E.O. 12958: DECL: 02/07/12
TAGS: ECON, EFIN, KWBG, EAID
SUBJECT: PA SCRAMBLING TO PAY WAGE BILL AS WORST FISCAL CRISIS YET LOOMS

ACTIVITY IN THE WEST BANK AND GAZA STEMMING FROM THE CLOSURE HAS ALSO CUT INTO DOMESTIC COLLECTIONS. (EVEN IF THE ISRAELIS WERE TO RENEW THE CLEARANCE SYSTEM, THE PA WOULD NOT BE ABLE TO BALANCE ITS NON-CAPITAL BUDGET, AS IT WAS IN THE MONTHS IMMEDIATELY PRECEDING THE INTIFADA.)

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9. (C) ACTION REQUEST: THE USG HAS INTERVENED ON THIS ISSUE WITH THE GULF STATES IN THE PAST, AND IT IS TIME TO DO SO AGAIN. WE WOULD RECOMMEND MESSAGES TO SAUDI ARABIA, THE UAE, QATAR, KUWAIT AND EGYPT, ESPECIALLY, COMMENDING THE ARAB LEAGUE FOR ITS GENEROUS ASSISTANCE TO DATE, NOTING SAUDI ARABIA'S $45 MILLION BRIDGE FINANCING AND URGING MEMBERS TO FOLLOW RIYADH'S EXAMPLE.

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Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches

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The 2008 Jonathan I. Charney Lecture in International Law
Vanderbilt Law School, Nashville, TN

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Thank you very much for that kind introduction. And thank you all for having me here at Vanderbilt. I'm delighted to have the opportunity to visit this great university and law school. And I'm particularly grateful to Dean Rubin, and to Professor Newton for arranging my visit. I'd also like to thank Mrs. Sharon Charney for endowing this lecture in honor of her late husband Professor Jonathan I. Charney. As you know, Professor Charney taught at Vanderbilt for many years. He was well-known to the Legal Adviser's office as one of the world's foremost experts on maritime law and as author of a leading treatise on the subject. He also served on the original U.S. delegation to the UN Conference on the Law of the Sea.

U.S. foreign policy – under every Administration – involves promoting respect for human rights around the world. Most of you probably know that the State Department spends a great deal of time and effort, abroad, persuading foreign governments to change their human rights behavior and administering programs to advance the cause of human rights. What many of you may not be aware of, though, is that we are now quite frequently occupied, *domestically*, with suits by foreign plaintiffs in U.S. courts – often arising from conduct that occurred in other countries and

has no significant connection to the U.S. – that may not be consistent with our governmental policies for promoting human rights.

That is where I will focus my remarks today – in particular, on the Alien Tort Statute, or "ATS," a nearly 220-year-old statute that has been interpreted to allow foreign plaintiffs to bring suit in U.S. courts for violations of international law. The ATS was the subject of a seminal Supreme Court decision in 2004, *Sosa v. Alvarez-Machain*, which outlined the limited reach of the ATS. Still, ATS litigation continues to present complications for U.S. foreign policy and our efforts to promote human rights.

Let me make several observations regarding the ATS at the outset. The *first* is that ATS litigation continues largely unabated, despite the Supreme Court's attempt in *Sosa* to rein it in. *Second*, the ATS has given rise to friction, sometimes considerable, in our relations with foreign governments, who understandably object to their officials, or their domestic corporations, being subjected to U.S. jurisdiction for activities taking place in foreign countries and having nothing to do with the United States. *Third*, the development of the scope of the ATS has largely been left to litigants and the courts, without formal involvement from Congress and largely contrary to the views of the Executive. This has been a problem, not least because many recent ATS suits have tended to implicate important aspects of U.S. foreign policy. In the end, there are good reasons for limits on the scope of the ATS – through courts exercising restraint, or if necessary, through legislation. We need to ensure the ATS does not complicate international efforts by the political branches to promote human rights abroad, a cause to which the United States is deeply committed.

But first, some background on the statute. Many of you are likely familiar with the Alien Tort Statute, sometimes referred to as the Alien Tort Claims Act. And you may already know that this is one instance where reading the text of the statute doesn't get you very far. In its entirety, the statute reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS was included by the First Congress in the Judiciary Act of 1789, but in its first 190 years, the statute provided jurisdiction in only two cases, and why it was enacted is something of a mystery. This led Judge Friendly famously to call the ATS a "legal Lohengrin," because "no one seems to know whence it came."

What little we do know about the ATS's origins suggests that its principal motivation was to provide redress for offenses committed by U.S. persons against foreign officials in the United States. In the pre-Constitutional period, there were concerns that foreigners would not have adequate redress in state courts for wrongs committed against them in violation of the law of nations. Under the law of international responsibility at the time, the U.S. would be held accountable internationally for the failure to provide such redress. The jurisdictional scope of Article III of the Constitution, and the enactment of the ATS by the First Congress, addressed this issue by providing jurisdiction for foreigners to seek remedies in federal court.

The modern origins of ATS case law date to the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, which permitted an ATS suit by two Paraguayans

living in the U.S. against a former Paraguayan government official (who also was living in the U.S. at the time of the suit) for the torture and killing of a family member in Paraguay. The court held that torture is a violation of the law of nations and that, under the ATS, U.S. courts could decide a torture claim arising in a foreign country. The decision in effect sanctioned use of the ATS for international human rights litigation, and from there, ATS cases in the federal courts grew substantially. After *Filartiga*, federal courts heard myriad suits alleging human rights abuses by individuals, including, notably, a suit brought against the leader of Bosnian-Serb insurgents by citizens of Bosnia-Herzegovina and a suit against former Philippine president Ferdinand Marcos by Philippine nationals.

In the 1980's, most ATS cases tended to involve circumstances like those in *Filartiga* – suits by foreign nationals against officials of their own government for conduct that occurred in a foreign State. By the 1990's, the focus of ATS litigation expanded, with plaintiffs bringing more suits against *private* actors, mainly corporations, for among other things, aiding and abetting alleged human rights abuses perpetrated by foreign governments. In all, more than 100 ATS suits have been filed since *Filartiga*.

Against this background, the Supreme Court for the first time considered the ATS in its modern incarnation in the 2004 case of *Sosa v. Alvarez-Machain*. In *Sosa*, a Mexican plaintiff alleged that the defendant, also a Mexican national, acted at the direction of the U.S. Drug Enforcement Agency to help abduct the plaintiff in Mexico. The plaintiff was thereafter transferred to the United States, where he was eventually prosecuted by U.S. authorities and acquitted. The –

plaintiff contended that his forcible abduction in Mexico by the defendant amounted to an arbitrary detention in violation of customary international law.

The Supreme Court ruled that the ATS is only a jurisdictional statute, and does not by itself create a cause of action. But the Court also reasoned that the First Congress "understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations." Justice Souter's opinion for the Court identified three 18th-century causes of action as paradigmatic: offenses against ambassadors, violations of "safe conduct," – that is, official permission for a foreigner to travel freely through U.S. jurisdiction – and piracy. The Court also did not foreclose certain additional suits for violations of international law, provided, among other limitations, that the claim "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features [of these paradigmatic offenses]." Applying this limitation, the Court rejected Sosa's specific claim that international law prohibited "arbitrary detention."

Justice Scalia, in a concurring opinion, would have held that the ATS is a jurisdictional statute and nothing more, and that it does not authorize present-day federal courts to create any causes of action for violations of international law. That task would necessarily fall to the Congress.

The Court thus accepted the narrow "jurisdictional" interpretation of the ATS advocated by the Executive Branch, but held that the ATS authorized federal courts to recognize certain new causes of action. Significantly, however, the Court identified a number of factors that counseled special "judicial caution" and a "restrained conception of the discretion a federal court

should exercise in considering a new cause of action" under the ATS. Among other things, the Court recognized the "potential implications for the foreign relations of the United States" that "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Accordingly, the Court stressed that devising new federal common law causes of action based on international law "should be undertaken, if at all, with great caution." Justice Souter's opinion summed up the situation: the door for ATS litigation was "still ajar subject to vigilant doorkeeping."

Notwithstanding the Court's directive for restraint, almost four years later, litigation has showed no signs of slowing down. Plaintiffs continue to push against the door the Court left "ajar," arguing for expansive applications of customary international law. Among the suits courts have heard are a suit against an American company for selling Israel bulldozers under a U.S. military assistance program that were eventually used to demolish Palestinian homes; a suit against U.S. chemical companies that manufactured Agent Orange used by the U.S. military as a defoliant during the Vietnam War; a suit against two high-ranking government officials of the United Arab Emirates alleging involvement in abuses of underage camel jockeys; and a suit against a Canadian energy company for aiding and abetting human rights abuses by investing in Sudan. The Second and Ninth Circuits, in particular, have proceeded as before. One post-*Sosa* federal court has frankly conceived of its role as that of a "quasi international tribunal[ ]," dispensing an

international law that "supersed[es] and supplies] the deficiencies of national constitutions and laws."[1]

This continued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits. These problems center on five key issues: *First,* whether the ATS applies extra-territorially – that is, whether a U.S. court can properly apply U.S. federal common law under the ATS to conduct that occurred entirely in the territory of a foreign State. *Second,* even if such a cause of action could properly be recognized, whether exhaustion of adequate and available local remedies in that foreign country should be a prerequisite to bringing an ATS suit. *Third,* whether corporations or other private entities may be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments. A *fourth* issue is how to apply *Sosa's* requirement that an international-law norm be sufficiently accepted and specific. And *fifth,* in what circumstances should courts dismiss suits based on what *Sosa* referred to as "case-specific deference to the political branches"?

American Isuzu Motors v. Ntsebeza, also known as the *Apartheid* case, which is now in the petition stage before the Supreme Court, exemplifies both some lower courts' resolution of these questions and their approach to the ATS after *Sosa.* This suit was brought by former victims of Apartheid in South Africa against more than three dozen private corporations for allegedly aiding and abetting human rights abuses committed by the former Apartheid regime. In essence, the case

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[1] Judge Jack Weinstein of the Eastern District of New York, in the *Agent Orange* case. 373 F. Supp. 2d 7, 17 (EDNY 2005).

seeks to hold those corporations liable for doing business in South Africa during the Apartheid era.

In the district court, the post-Apartheid government of South Africa filed a statement of interest objecting to the suit and urging its dismissal. The filing stated that the litigation threatened investment in South Africa and interfered with South Africa's resolution of the legacy of Apartheid, which was "informed by principles of reconciliation, reconstruction, reparation and goodwill." When the case was still being litigated in the district court, the Supreme Court in *Sosa* took the extraordinary step of singling it out by name in a footnote as possibly appropriate for dismissal based on "case-specific deference to the political branches."

The district court heeded these cautions, dismissing the suit on the ground that aiding and abetting claims are not actionable under the ATS. The Second Circuit reversed, relying in part on the *absence* of any express restriction in the ATS on aiding and abetting liability – this, despite the Supreme Court's admonition in Sosa that courts exercise restraint and look to positive legislative guidance.

In February, the United States filed an amicus brief requesting that the Supreme Court grant certiorari in the case to consider whether the ATS allows suits for aiding and abetting and allows U.S. courts to apply U.S. federal common law under the ATS to conduct occurring in a foreign State. If the Supreme Court grants review, the case could be heard as early as this fall.

The U.S. government's brief urging certiorari in the Apartheid litigation is one of many statements of interest and amicus briefs that we have filed post-*Sosa* in those ATS suits that implicate significant U.S.

foreign policy interests. Since *Sosa*, we have made such filings in about a dozen cases. Given the nature of the underlying allegations in certain cases, the decision whether to file can be a weighty one.

Our usual practice in these cases has been to make arguments for *general* legal principles concerning ATS litigation, and to avoid delving into the underlying merits of any particular case. We have typically argued, as we have in the Apartheid case, for limiting ATS litigation by resolving legal issues in light of *Sosa*. These include the issues of extraterritoriality, aiding and abetting, and exhaustion of local remedies. For example, we argued in a Ninth Circuit case that a cause of action does not lie under the ATS for a suit against a British mining company concerning conduct that occurred in Papua New Guinea, and that in any event, plaintiffs should seek their remedy first in Papua New Guinea, not in federal court in California. The Executive has sought to have courts dismiss one case – the suit involving the bulldozers used by the Israelis – based on "case-specific" deference to the political branches, as suggested in *Sosa*. Although the bulldozer case was dismissed, these arguments have not always won traction in the lower courts. Still, they remain in play in a number of cases and ultimately their validity will likely be determined by the Supreme Court.

Now let me turn to some of the issues raised by ATS litigation.

To start, it has been argued that ATS litigation holds out the possibility of certain benefits. Let me mention three quickly. *First* is that ATS suits can promote accountability and provide a public voice to victims of terrible human rights abuses, when no other forum is available, and that allowing claims of human

rights abuses to be heard in court helps recognize the dignity of the victims. *Second* is that ATS litigation may help to raise public and political awareness of human rights abuses that might not gain attention otherwise, which, it is said, might have the effect of spurring political action to address ongoing abuses, prevent future abuses, or devise appropriate standards of conduct for corporations. *Third*, ATS litigation might advance U.S. participation in the development of customary international law.

Apart from the fact that they are not legal arguments, and were not the reasons for enactment of the ATS, these suggested benefits also may not be as significant as they might first seem. ATS cases might not be always driven by a simple desire to see justice done; like all private civil litigation, they might sometimes be motivated by other considerations, such as money or politics. Moreover, litigating issues in U.S. courts does not generally promote the development of effective remedial mechanisms in the foreign country concerned. The benefits of having U.S. courts engage in the development of international law are also not altogether clear, because much ATS litigation has focused on defining U.S. *domestic* law and its proper reach. And properly so: the Supreme Court held in *Sosa* that the law to be applied under the ATS is *U.S.* federal common law. That law governs, for example, the extraterritorial application of the ATS, and also in large part aiding and abetting liability and exhaustion of local remedies. When courts do consider customary international law, there is also a risk that their interpretations could be in tension with those advanced internationally by the Executive Branch. Still, an assessment of the ATS as a matter of policy should consider these issues.

There are also substantial costs to ATS litigation. The important ones are not financial – ATS suits can be expensive to contest, but so far, ATS litigation has not produced large judgments that can realistically be executed. Indeed, that is one of its weaknesses – it does not provide any effective relief in the vast majority of cases. The real costs, however, fall into two basic categories: what I will call "diplomatic" costs and "democratic" costs.

First, the "diplomatic" costs. Here, I can assure you that foreign governments do not see the ATS as an instance of the United States constructively engaging with international law. Quite the opposite: we are regarded as something of a rogue actor. We are perceived, accurately, as having in effect established an International Civil Court – a court with jurisdiction to decide cases brought by foreigners arising anywhere in the world, by the light only of its own divination of universal law, and through the extraterritorial application of U.S. law concerning rights and remedies. By itself, this can be grating enough to foreign governments. But it is especially so when taken together with both the fact that the U.S. often argues vigorously against the assertion by foreign courts of universal jurisdiction to hear cases involving U.S. officials, and the fact that the U.S. has declined to join the International Criminal Court because of concerns about that tribunal's jurisdiction.

In letters to the State Department or in amicus filings in federal courts, foreign governments consistently argue that the assertion of U.S. court jurisdiction over cases that have little connection to the United States is inconsistent with customary international law principles and interferes with national sovereignty. Canada, for example – internationally, a

strong promoter of human rights and accountability for human rights violations – strongly objected to a case in the Second Circuit against a Canadian energy company for allegedly aiding and abetting human rights abuses in Sudan. The U.K. and Australia – also leading human rights advocates – have similarly argued that the scope of ATS jurisdiction is inconsistent with principles of international law.

When you consider the Sudan case, or the Apartheid case, from other countries' perspective – a good thing to do generally in international law and relations – there is considerable force to these criticisms. Imagine, for example, what the U.S. reaction would be if a Swiss court sought to adjudicate claims brought against U.S. government officials or businesses for Jim Crow-era racial restrictions, or – since (without a statute of limitations) ATS suits can reach far into the past – even for slavery. As much as we might denounce past injustices, most of us would probably take offense at the notion that a Swiss court could hear such a suit and decide it based on the court's own articulation of international law. The United States, after all, has come to terms with and sought to remedy the effects of slavery and Jim Crow laws through domestic measures under Acts of Congress and state laws resting on a strong moral consensus of our people – and according to the principles, procedures, and norms of our legal system. From the South African perspective, the Apartheid case must look very similar, and it is no wonder that the South African government has asked that the case be dismissed.

Serious diplomatic costs also attend *Filartiga-type* litigation against foreign officials. For example, a series of ATS suits against Chinese officials by Chinese Falun Gong members is an issue of considerable

importance to the Chinese government. In these suits, plaintiffs have served Chinese officials while they were traveling in the United States on official business, which is the basis for the courts' personal jurisdiction. The diplomatic friction caused by these cases runs directly contrary to one of the reasons for enacting the ATS – to *prevent* harassment of foreign officials in the United States and *prevent* international incidents. And it strikes other countries as hypocritical to entertain such suits at the same time we complain about civil and criminal actions brought against U.S. officials in other countries.

In addition to causing diplomatic friction, ATS litigation also exacts "costs" through the lack of democratic checks and accountability. For one, the ATS places few limits on who may bring suit. By its terms, any "alien" can bring suit, and often suits are brought by aliens who have no presence in, or contacts with, the United States. Unlike criminal cases, which are subject to policy and political checks through the exercise of prosecutorial discretion, *Sosa* has not – at least not yet – provided an effective restriction on the types of claims asserted under the ATS. Indeed, the American bar is actively soliciting alien plaintiffs to open up new areas for ATS claims, for instance in the area of environmental litigation.

More broadly, the lack of a predicate judgment by the political branches that such suits should be brought is a significant problem. As I noted earlier, Congress, in the text of the ATS, has provided virtually no guidance to courts as to how to define causes of action under U.S. law based on international legal norms. The modern ATS is mainly the product of judicial decision-making. This fact was noted by the Supreme

Court in *Sosa* and was clearly part of the reason for its "restrained conception" of the statute.

Furthermore, unlike the limited and specific nature of 18th-century law-of-nations offenses, such as piracy, international law today has developed significantly and comprises a significant and somewhat unwieldy body of norms. ATS plaintiffs nearly always rely on customary international law. As a practical matter, management of ATS litigation depends on the least politically accountable branch – the Judiciary – interpreting an ill-defined body of law – customary international law – that is the *President's* responsibility on the international plane, and that unlike statutory or treaty law, is not the product of a formal Legislative or Executive process.

The text of the ATS does not provide for a formal role for the Executive Branch in ATS litigation. Here, it is worth comparing the role of the Executive in policing the terrorism exception to foreign sovereign immunity. As you probably know, under the Foreign Sovereign Immunities Act, or FSIA, foreign states are immune from suit subject to certain exceptions. In 1996, an exception was added for suits based on acts of terrorism. Whatever the terrorism exception's merits, in enacting it, Congress took some account of the fact that it could complicate the President's conduct of foreign affairs, and gave the Executive an important role in the application of the exception. Rather than permitting suits against any State based on allegations of terrorism, only States designated by the Executive as "state sponsors" of terrorism lost their immunity as to terrorism claims. While litigation under the terrorism exception presents some of the same problems raised by ATS litigation, the fact that the Executive has a role in the scope of that litigation

has helped limit potential frictions between the courts and the Executive arising from terrorism-related lawsuits. And, of course, the FSIA exception was the result of an affirmative Act of Congress, which has the authority (and political accountability) under the Constitution to define the Law of Nations and the jurisdiction of the federal courts.

As I have said, the Executive Branch often participates in ATS litigation as an amicus. Such filings are made by the Justice Department in coordination with the State Department and, as appropriate, other components within the Executive Branch. Sometimes, especially in the district courts, filings are made in response to an invitation from the court to express the views of the United States. Those requests are themselves a sign that ATS litigation is putting the courts in the awkward position of adjudicating issues touching on U.S. foreign policy. If an area of the law is fraught with such risks to broader national interests that it requires courts to regularly seek the advice of the Executive Branch, perhaps courts are being asked to delve into matters that are not well-suited for litigation in U.S. courts, and are more appropriately addressed by other means.

Such case-by-case participation can put the Executive Branch in a difficult spot, too. Foreign governments will continue to press U.S. Administrations to weigh in on their behalf in ATS litigation. If the Executive is expected to weigh in when litigation presents foreign policy concerns, courts may come to infer (wrongly) from its silence in other cases that there are no such concerns. In addition, foreign governments may come to regard the Executive's decisions whether or not to file as a reflection of the United States' view of its bilateral relationship with that government.

Domestically, foreign policy submissions will often be read as partisan support for the activities of foreign governments over the deserving interests of the plaintiff victims.

But despite the problems of case-by-case participation, the Executive Branch has real interests in ensuring that as a matter of policy, ATS litigation does not interfere with its conduct of foreign relations. I have already noted foreign governments' concerns about the scope of U.S. court jurisdiction under the ATS. In addition, recent ATS suits have been used by litigants to duplicate, replace, or proceed on top of the U.S. government's systemic efforts to reform foreign government practices or help end foreign conflicts. Often, these suits are brought as class actions for all aliens injured by the challenged conduct, effectively asking the U.S. courts to serve as administrator of an international claims program for foreign nationals. This is illustrated by the nature of the claims in the Apartheid and Falun Gong cases, in which the plaintiff classes potentially comprise millions of South Africans and Chinese, respectively. Cases such as these tend to directly implicate broad U.S. foreign policy concerns.

Without a formal role in the statute, the Executive's participation through statements of interest and amicus briefs is one of the few practical ways that the United States can seek to confine the scope of the ATS in a manner that is faithful both to its limited historical roots and the restrained conception of the ATS explained by the Supreme Court in *Sosa*. Compare for example the Torture Victims' Protection Act, or TVPA. Congress enacted the TVPA in 1992 to provide an express cause of action for aliens or U.S. citizens to sue for torture or extrajudicial killing committed under the color of foreign law. In enacting the

TVPA, Congress included several important provisions requested by the Executive. Accordingly, the statute requires exhaustion of adequate and available local remedies, limits suits to conduct by state actors, and provides for a 10-year statute of limitations. The TVPA is far from perfect, and it can have the effect of thrusting U.S. courts into foreign relations. But it is the result of a legislative process – one that resulted in several limitations in the TVPA that take account of U.S. foreign policy interests. For these reasons, there are fewer occasions for the U.S. to file statements of interest or amicus briefs in TVPA litigation. By contrast, the U.S. government's practice of filing statements of interest and amicus briefs in ATS cases can be understood as a necessary substitute for the fact that there was never a legislative process resulting in an Act of Congress creating causes of action for the assorted international norms that plaintiffs have asserted under the ATS.

Going forward, we need to consider how to limit the costs of the Alien Tort Statute – both diplomatic and democratic. A critical first step is to recall the ATS's original purposes of providing foreigners an adequate means of redress for other offenses committed in U.S. territory, and perhaps on the high seas in the case of piracy. ATS actions should be confined to situations that closely resemble the types of suits the First Congress had in mind.

In addition, to the extent causes of action are allowed under the ATS, it would make particular sense to bring the ATS in line with the TVPA by requiring exhaustion of local remedies. It seems odd, for example, that exhaustion is required for claims of torture or extrajudicial killing under the TVPA, but not for a less heinous abuse alleged in an ATS suit. Even if, contrary

to the U.S. position, an ATS suit based on conduct in a foreign territory can be entertained, an exhaustion requirement would protect our courts from wading into disputes more appropriately litigated elsewhere and could spur foreign governments to develop their own adequate means of redress.

In *Sosa*, the Supreme Court expressly "welcome[d] any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations." A bill introduced by Senator Feinstein in 2005 would have resolved some of the problems I have identified, but was withdrawn without the Senate taking any action.

If Congress were to legislate, it could apply a clear statute of limitations for ATS claims and provide precise definitions of authorized causes of action – again, much like the TVPA. A statute of limitations would prevent courts from resurrecting very old controversies that the foreign state has long since put to rest. (Indeed, several courts of appeals have already imported the TVPA's 10-year statute of limitations into the ATS, and state-law limitations periods are also sometimes borrowed for federal causes of action.) Defining causes of action legislatively would lend certainty and accountability to the litigation – judges would no longer be left to divine causes of action in the unfamiliar materials of international law – and such definitions would embody the judgment of Congress and the President as to the content of international law. Another meaningful step might be to prohibit class actions. If Congress were to act, however, it should also proceed cautiously, because of the great potential for suits in U.S. courts regarding conduct in foreign countries to interfere with the Nation's foreign policy.

Beyond the ATS, however, we also need to focus on the many other tools the U.S. government, and in particular the State Department, can use to prevent and redress human rights abuses. Some of these are tools of persuasion – for example, the State Department's annual human rights reports, which review countries' human rights practices and focus attention on reported abuses. The State Department also conducts quiet and public diplomacy, in bilateral and multilateral fora, and administers a variety of programs intended to foster development of the rule of law in other countries – a critical aspect of preventing and redressing human rights abuses. We also support voluntary multi-stakeholder initiatives to promote corporate codes of conduct in the developing world, such as the Voluntary Principles in the Extractive Industries.

At the same time, the United States continues to support holding foreign government officials, and other persons, criminally accountable when they commit torture or other serious human rights abuses. In the cases of Rwanda and the former Yugoslavia, the United States has supported special international tribunals to try and punish the guilty. In addition, the domestic *criminal* law and jurisdiction of the United States is available to punish torture and genocide. For example, the federal government is currently prosecuting Chucky Taylor, the son of the former Liberian leader Charles Taylor, on charges of torture stemming from abuses perpetrated in July 2002 in Monrovia, Liberia.

We need to continue to foster these and other approaches to enforcing human rights. The problem that human rights enforcement must ultimately address – and for which the ATS is of little avail – is the failure of foreign countries' own *domestic* rule-of-

law institutions to prevent and provide redress for abuses. These failures cannot be fixed by any single policy program or lawsuit, and certainly not by making U.S. courts ad hoc claims tribunals. Rather, inculcating a respect for law and human rights takes a sustained and careful effort focused on strengthening legal institutions in foreign States, not necessarily expanding the reach of our own.